(1)

No. 03-1633 APR 30 2004

IN THE

Supreme Court of the United States

"*In re* ALLEGRA D. HEMPHILL"
Petitioner,

v.

THE PROCTER & GAMBLE COMPANY,

KIMBERLY-CLARK CORPORATION,

and JOHNSON & JOHNSON
subsidiary McNEIL-PPC, INC.
Respondent(s).

On a Petition for an
EXTRAORDINARY WRIT OF MANDAMUS
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

1. There was absolutely no verbal communication with the district court judge, Judge Chasanow, in either case, Hemphill v. Procter & Gamble Co. et al., 258 F. Supp. 2d. 410 (D. Md. 2003) DKC 2002-3736, or Hemphill v. McNeil-PPC, Inc., 134 F.Supp. 2d. 719 (D.Md.2001) DKC 99-654. There was "no day in court", " no jury trial" and "no hearing". The district court judge denies the constitutionality in a patent case is protected by a seventh amendment right (jury trial). Thus, the extraordinary question for the Supreme Court is,

> Is the way the district court judge interprets a Maryland Local Rule 105.6 as "Fully briefed and **no hearing** deemed necessary" unconstitutional?

2. The district court judge made a recent change in Markman v. Westview Instruments, Inc., 52 F3d. 967, (Fed. Cir. 1995) 979 (en banc), aff'd. 517 U.S. 370 (1996):

> "claim construction is for "the court" to decide."

This change could overturn the constitutionality in patent cases being decided by a jury trial. The change in *Markman* is unclear about which court, is "the court" to apply the law 35 U.S.C.§ 112, ¶2 (claims distinctly claiming), but the Supreme Court instructed the Federal Circuit to sharpen the criteria for determining equivalency (element by element basis).

This change in controlling law "subverts the balances"

for the Federal Circuit to evaluate the full range of equivalency under the doctrine of equivalents. The Federal Circuit had the wrong impression that the law was already applied so that neither court in this case completes claim construction in the'720 patent. The question before the Supreme Court is,

> Without a jury trial, should the above *change in law* include the Supreme Court as "the court" to decide and settle the issue of claim construction under 35 U.S.C. §112 for a literal analysis and/or doctrine of equivalents?

3. The "automatic estoppel" in this case, anticipated the applicant would surrender structure in the '720 patent, while awaiting claim construction. The sole argument permitted at summary judgement was "non-infringement". The cause of action: Literal Patent Infringement 28 U.S.C.§1338 was never heard and the application of patent law 35 U.S.C.§ 112,¶2 was not performed. If the district court judge can deny a literal analysis without showing her work or stating a reason, and the factual determinations made by the district court judge are essential to the judgement in the Federal Circuit conflicting with other US Court of Appeals,

> What are the factors *to know* there is a "genuine" issue for a jury trial?

PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT

The parties to the proceeding, are, as follows:

The Petitioner is Allegra D. Hemphill.

The Procter & Gamble Company is a parent company of Procter & Gamble Co. in Cincinnati, Ohio.

Kimberly-Clark Corporation in Dallas, Texas is a parent company of Kimberly-Clark in Neenah, Wisconsin.

Johnson & Johnson , at One Johnson & Johnson Plaza New Brunswick, New Jersey 08933 is a parent company of McNeil-PPC, Inc.

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PATENT AND TRADEMARK OFFICE
Address: Commissioner of Patents and Trademarks,
Washington, DC 20231

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In the US Court of Appeals for the Federal Circuit, Case No. 03- 1463, Allegra Hemphill v. The Procter & Gamble Co. v. Kimberly-Clark Corporation, is an unpublished opinion by Randall R. Rader, William C. Bryson and Arthur J. Gajarsa Circuit Judges, and authored by Randall Rader. (January 15, 2004). (App., *infra*, 1A-7A.). In the United States District Court of Maryland, the opinion of Deborah K. Chasanow, district court judge in DKC 2002-3736, is reported at Hemphill v. Procter & Gamble Co. et al., 258 F. Supp. 2d. 410 (D. Md. 2003) (App., *infra*, 11A-26A).

Hemphill v. McNeil-PPC, Inc . 25 Fed. Appx. 915, 2001 WL 1504561 (Fed. Cir.2002), is an unpublished opinion by Raymond C. Clevenger, III, Arthur J. Garjarsa and Timothy B. Dyk Circuit Judges, authored by Dyk. (App. *infra*, 27A-40A). The opinion of the district court judge Deborah K. Chasanow is reported at 134 F.Supp. 2d. 719 (D.Md.2001). (App., *infra*, 46A-69A).

STATEMENT OF JURISDICTION

Judgement in the US Court of Appeals for the Federal Circuit entered January 15, 2004. App. *infra*, 1A. The Combined Panel Rehearing and Rehearing En Banc, was denied February 23, 2004. App. *infra*, 72A-73A. Jurisdiction in the Supreme Court is invoked under 28 U.S.C. § 1651(a).

Pursuant to Title 35 United States Code 112, granting an extraordinary writ of mandamus will aid the appellate's jurisdiction. Statutory language is mandatory which legally obligates this Court to implement the law. It is not optional because "[s]tatutes are written instruments that *all persons* are presumed to be aware of and *are bound* to follow." "Statutes like patents *are enforceable* ..." See Markman v. Westview Instruments, Inc., 52 F3d. 967, (Fed. Cir. 1995) 987 (en banc), aff'd.Rule 20(3)(a). Exceptional circumstances warrant the exercise of the discretionary powers in the Supreme Court because adequate relief regarding specific issues unique to patent law could not be obtained in any other form or from any other court.

Parties were notified as required under Rule 29.3.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

1. The United States Letters Patent 4,557,720 is a grant of intellectual property. The Constitution of the United States provides:

> Art. 1. Sec. 8.: "The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Withholding claim construction is in violation of the FOURTH AMENDMENT RIGHT.

"*The right of the people to be secure in their* persons, houses, *papers and effects,* against unreasonable searches *and seizures, shall not be violated,* and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The lower courts are "unprepared" for such unique circumstances regarding both, a pro se litigant exercising her rights under 28 U.S.C. § 1654 and claims in the '720 patent that were never amended. The lower courts did not address the issue of patent law 35 U.S.C.§ 112,¶2 and more specifically 35 U.S.C. §112,¶6.

See 35 U.S.C.§112 paragraph, 2, providing in pertinent part:

> "The specification shall conclude with one or more *claims particularly pointing out and distinctly claiming* the subject matter *which the applicant regards as [her] invention."*

and see 35 U.S.C. §112, ¶6 which provides in pertinent part:

> "*An element in a claim* for a combination *may be expressed as a means or step for performing a specified function* without the recital of structure, material, or acts in support thereof, and *such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.*"

See 35 U.S.C.§ 112 at App., *infra,* 76A-77A.

3. The US Court of Appeals for the Federal Circuit Rules of Practice (May 1, 2003) on page 135, ¶15 states in relevant part: "Oral argument (usually 15 minutes or less) is *rarely needed in pro se cases.*" However, in the United States District Court of Maryland, the district court judge denied a jury trial in a patent case and imposed upon a Maryland Local Rule105.6 that states in relevant part:

> "Unless otherwise ordered by the Court, all motions shall be decided on memoranda without a hearing."

Since the 8th day of March 1999, a fair hearing was not deemed necessary and there was no jury trial. The pro se litigant has not spoken with the district court judge; has not seen the district court judge; nor been face-to-face before the district court judge nor any of the Federal Circuit Judges deciding this patent infringement action during the entire five (5) years. Therefore, the lower court is in violation of:

FIRST AMENDMENT RIGHTS.

"*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof, or *abridging the freedom of speech,* or of the press, or the right of the people to peaceably assemble, *and to petition the Government for a redress of grievances.*"

SEVENTH AMENDMENT RIGHTS.

"*In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,* and no fact tried by a jury shall be

otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FOURTEENTH AMENDMENT RIGHTS.

"*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

4. The patent owner has *clean hands*. Validity issues were resolved before any and all legal proceedings. App. 48A at [FN2]. The results of two reexaminations in the United States Patent and Trademarks Office ("the US PTO") proved that the patentability in claim 1 and 2 in the '720 patent is confirmed and thus, the claims are reading exactly as they did in the original patent application. See the '720 patent in App. Vol. 2, 107-114A. See e.g., Reexamination Certificate which states: NO AMENDMENTS HAVE BEEN MADE TO THE PATENT. App., *infra,* 103A, 105A and 106A. (MPEP §§2012.01 and MPEP§§ 2259).

STATEMENT OF THE CASE

The Petitioner, Allegra Hemphill, ("Hemphill") is the inventor and patent owner in the US Patent 4,557,720 ('720 patent) dated December 10, 1985. The elected species is #4, Figures 8 and 9 in Col. 5 ll.27 through Col. 6 ll. 58.

There are two independent claims. See App, *infra* 15A . Claim 1 is asserted. .[1]

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[1] At the time of naming a vaginal swab, the word "vaginal" was readily defined in Webster's New Collegiate Dictionary1281(**1979),** as: 1. of, or relating to a theca. 2. Pertaining to the vagina. In fact, the word "theca" in the American Heritage College Dictionary, 1405 (3rd ed. 1993) is defined as: a case, covering or sheath... In the claims, the word "vaginal" pertains to outer housing as a container, cover or sheath.

A vaginal swab is **defined in the claims** in the '720 patent Claim 2 reads: "an outer housing including an inner case member and an outer case member ..." in Col. 7, ll. 6-9 in the '720 patent Claim 1 reads to "a closed end...open end outer housing" in Col. 6, ll. 59-66.

In the **specification,** Summary of the Present Invention describes: "My device as set forth herein" is comprised of an outer container...[T]he swab portion is preferably comprised of...in Col. 1 ll. 66 through Col. 2, ll. 9 and Col. 2 ll. 19-23 which is consistent with "What I Claim" in Col. 6, ll. 59 through Col. 7, ll. 5. The structure for an outer housing in the **prosecution history** supports the dictionary definition for the word 'vaginal' defined in the American Heritage College Dictionary, 1488 (3rd ed. 1993) at: 2). Relating to or resembling a sheath, which is 'to encase or cover with' *quoting* American Heritage College Dictionary, 1254 (3rd ed. 1993).

> "In such a case, the definition selected by the patent applicant controls. "The law provides a patentee with this opportunity.." Renishaw PLC v. Marposs Societa' Per Azioni 158 F.3d. 1243 (Fed Cir 1998)1249.

In the claims in the '720 patent, the word "swab" pertains to the unit as [core member and adsorbent member] in Col. 6, ll.67 through Col. 7, ll. 5 and the word swab pertains to the unit as [a core member, porous material and the housing means] in Col. 7, ll. 10.

In the United States District Court for the District of Maryland, Allegra Hemphill, *proceeding Pro Se*, filed her complaint for cause of action: Literal Patent Infringement 28 U.S.C.§1338, on November 18, 2002 in Record No. 1 which writes on page 4 at ¶9A:

> "The asserted claim is claim 1 in the '720 patent. Claim 1 is directed to species #4 in Col. 5, ll. 28 through Col. 6, ll. 58, figures 8 and 9 in the '720 Patent. The complaint writes on page 6, ¶10: "The accused products designate at least, under the names Kotex® Poise® by Kimberly-Clark Corporation and Always® by Procter & Gamble Co." [2] Record 1.

The Procter & Gamble Co. and Kimberly-Clark Corporation, brought two separate Summary Judgement Motions for Non-infringement on February 11, 2003.[3] Record 22 and Record 23. Hemphill filed her Response Brief on February 25, 2003. Record 32. Procter & Gamble Co.

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[2] The accused devices are known as 'maxi pads', 'mini pads', 'ultra thins' and 'adult pads'.

[3] Tampax ® and Security ® were included as accused devices when the Judge Chasanow focused on "an external cover, an internal tubular member, and rotatable base." Id., Col. 1, ll. 19-22 at 63A. This structure in the Gelardin 2,393,677 Patent as a rotatable base or cam wheel, is not a limitation in [species #4, claim 5 and 6 in the original patent application 434,828 that are now claims 1 and 2 in the '720 patent].

and Kimberly-Clark Corporation filed two Reply Briefs on March 11, 2003. Record 33 and Record 34. On April 15, 2004, the district court judge granted the corporations the Motions for Non-infringement buttressing a Maryland Local Rule 105.6 "Fully briefed and **no hearing deemed necessary.**" App., *infra,* 12A.[4] Hemphill filed a timely Rehearing Brief on April 21, 2004 in Record 37, which writes in pertinent part:

> " ("Jury trial in patent cases is protected by Seventh Amendment. Elimination of the jury is not this court's choice to make. The constitutional right alone bars the majority's rule. The majority today denies 200 years of jury trial on patent cases in the United States . . . by simply calling a question of fact a question of law. The Seventh Amendment is not so readily circumvented.") Markman v. Westview Instruments Inc., 52 F.3d. 967 (Fed. Cir. 1995), on pg. 1000 at 3, The Constitution. See in Record 37, pg. 1.

Procter & Gamble Co. filed a Response Brief on May 2, 2003. Record 38. Kimberly-Clark Corporation filed their Response Brief on May 9, 2003. Record 39. Hemphill filed her Reply Brief on May 12, 2003. Record 40. The district court judge Chasanow, denied Rehearing citing a Maryland

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[4] See "Fully briefed and **no hearing** deemed necessary" in Hemphill v. McNeil-PPC, Inc., 134 F. Supp. 2d. 719 (D. Md. 2001). App., *infra,* 48A.

Local Rule 105.6 "Fully briefed and **no hearing deemed necessary**" on June 11, 2004. App. 8A. Notice of Appeal was filed on June 16, 2003. Record 41.

In the US Court of Appeals for the Federal Circuit, the Appellant's Brief and Appendix were filed as required in the Guide for Pro Se Petitioners and Appellants which was filed on July 14, 2003. The Procter & Gamble Co. filed a Statement and Kimberly-Clark Corporation filed a Formal Response Brief and Appendix. On December 15, 2003, Hemphill filed a Motion for Oral Argument. The court denied Hemphill's Motion for Oral Argument on December 16, 2003 which was mailed December 29, 2003. The US Court of Appeals for the Federal Circuit affirmed on January 15, 2004. Hemphill filed a Combined Panel Rehearing and Rehearing en banc on January 29, 2004 which was denied on February 23, 2004. The mandate issued on March 1, 2004. Therefore,

> "[T]he orderly administration...of the patent laws requires that ultimate review still be available [in the Supreme Court] regardless of the route chosen by the litigants."Brenner v. Manson 86 S. Ct. 1033.[5]

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[5] "Statutory interpretation is a matter of law strictly for the courts." See *Markman at 987.* Instruction(s) from the Supreme Court validates that the statute 35 U.S.C. §112¶2 is not discretionary law.

FACTUAL BACKGROUND

> The "[p]atent prosecution is an iterative process in which the applicant typically submits claims that are thought to be allowable, the examiner rejects the claims in view of the prior art, and the applicant then amends the claims to traverse the examiner's patentability rejections." FestoCorp. v. Shoeketsu Kinzoku Kogyo Kabushiki 234 F3d. 558 (Fed. Cir. 2000) 618.

However, it is a 'manifest injustice' for a district court judge to apply a prosecution history estoppel to claims that were not amended in the '720 patent:

> Claims 5 and 6 in the patent application 619,684 are now claims 1 and 2 in the Hemphill '720 patent. The claims are reading the same and exact way, as they did during the original patent application 434,828 at App., *infra*, 80A. During the prosecution history phase, claims 5 and 6 were withdrawn from consideration thus, safeguarding to protect them. See e.g., Paper No. 7 at 85A and Paper No. 10 at 90A. There were no amendments. Paper No. 10 at 90-93A. The PTO did not reject claims 5 and 6 which are now claims 1 and 2 in the '720 patent. See File Wrapper regarding species election #4, figures 8 and 9 at App.

94A-95A.[5] See the decision in the US PTO: "Election was made **without traverse** in Paper No. 1 as filed with continuation application papers [619,684] . . . The claims readable on the elected species are 5 and 6. Accordingly, claims 1-4 have been canceled." App. 96A.

Claims 5 and 6 were allowable. App. 97A-98A.

Hemphill behaved responsibly in the US PTO, yet Judge Chasanow misstated the facts. See App. *infra*, 13A-16A and 49A - 53A. In point of fact, the corporate entity, Johnson & Johnson, insisted it was Hemphill's responsibility to file two reexamination proceedings regarding their prior art and Hemphill was obliging to their requests in 1998. See App. *infra*, 99A-106A. [6]

The prior art McNair US Patent 4,285,343 ("the '343 patent") was not relevant under 35 U.S.C. 102 and not relevant under 35 U.S.C. 103. 99A-100A. The prior art of Srininvasan et al. US Patent (3,973,5567) ("the '567 patent") was *in nowise* equivalent to the Hemphill '720 patent. App. *infra* ,

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[5]The applicant instructed the Law Offices of Cushman, Darby Cushman to disclose prior art See App., *infra*, 83A-84A.

[6] The district court judge denied Hemphill the 'right to sue' Johnson & Johnson. See e.g., App. *infra*, 47A and 69A.

101A-104A. Claims 1 and 2 were confirmed

There were no changes in the specification and no changes in the drawings and no changes in the claims 1 and 2. App. *infra*, 103A.

See it is written: "NO AMENDMENTS HAVE BEEN MADE TO THE PATENT" at 105A-106A.

The district court judge did not know that an owner of a patent has the validity of a patent tested in the US PTO, where the most expert opinion exists. A reexamination will ensure that whatever happens during a reexamination proceeding, when it is concluded the Commissioner will issue a certificate setting forth the results of the proceeding and the content of the patent. App., *infra*, 105A-106A. The authority in the US PTO found no ambiguity in the claims in the '720 patent and the record in the US PTO is clear-cut, having been:

> "[r]eviewed by patent examiners, quasi-judicial officials trained in the law . . . having expertise in interpreting the [prior art] references and to be familiar with their work with the level of skill in the art and whose duty it is to issue only valid patents." Markman v. Westview Instruments, Inc., 52 F3d. 967, (Fed. Cir. 1995) 986 (en banc), aff'd.

The reexamination proceedings proved irrefutably, that accused devices are not sanitary napkins in the prior art

'567 patent, nor in the prior art '343 patent.[7] None of the corporations label the accused devices as "sanitary napkins" on the packaging and **none of the corporate Respondents have a patent** that covers the devices accused of infringing. The corporations did not contest any decision(s) or office actions by the US PTO, not at anytime.

A. To sanction the departure of a district court, the US Court of Appeals for the Federal Circuit has entered a decision in conflict with other US Court of Appeals that calls for an exercise of the Supreme Court's supervisory power

"Congress specifically created the Federal Circuit to resolve issues unique to patent law." "Such as prosecution history estoppel which is judicially created doctrine." FestoCorp. v. Shoeketsu Kinzoku Kogyo Kabushiki 234 F3d. 558 (Fed. Cir. 2000) 571. For fair consideration and equal protection under the law, a full *de novo* review is "due process". In this case, claim construction under the law 35 U.S.C.§112 is the indispensable and fundamental basis in the search for truth. It is being withheld and thus, denied.

Congress entrusted the Federal Circuit as the court to

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[7]The district court judge made procedural errors by referring to accused devices as "sanitary napkins" before reviewing all the evidence. See e.g., App. 14A and 23A.

enforce the law unique to patent cases. However, the mandatory, statutory requirement 35 U.S.C. §112, ¶2 is absent from each and every opinion by Judge Chasanow. As proof, there is absolutely no mention of the law under 35 U.S.C. §112, ¶2, nor any reference to the law in any of her judgements or opinions in order for the court to enforce the law. Without any justifiable reason, this district court judge has forsaken the supreme law of the land that protects '*claims pointing out and distinctly claiming ...which the applicant regards as [her] invention*'. Judge Chasanow personally decided not to obey the law in 35 U.S.C. §112, ¶2, as well as 35 U.S.C. §112, ¶6: '*shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof*'. Judge Chasanow's repudiation of the law, in and of itself, is a factual dispute that gives grounds for a jury trial. See App. *infra,* 22A at [FN 4]and 61A-65A. For this reason, a pro se litigant, must not be deprived of an opportunity to bring a literal patent infringement action simply because the district court judge is *erring*.[8] The Petitioner is the patentee/applicant to which the

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[8]The controlling law is clear: "at the summary judgement stage, the judge's function is not herself to weigh the evidence... but to determine whether there is genuine issue for trial." "fact-finding is an inappropriate exercise on summary judgement: "by making such a factual finding the court improperly resolved a disputed material factual issue." Pfaf v.Wells Electronics, Inc. 5 F3d. 514 (Fed. Cir. 1993) 519.

patent law protects under 35 U.S.C. §112,¶ 2 and Judge Chasanow rejected the law. The record in the US PTO proved the claims in the '720 Patent were never amended so that

> "No reason or warrant exists for limiting application of the doctrine of equivalents to those comparatively few claims allowed exactly as originally filed and never amended" See FestoCorp. v. Shoeketsu Kinzoku Kogyo Kabushiki 234 F3d. 558 (Fed. Cir. 2000) 618.

Claim construction is flawed because it is incomplete. Now, claim construction is in a state of delay because there are two unnecessary estoppels in claim 1. The district court judge applied a prosecution history estoppel from an earlier case, and also, applied 'a general collateral estoppel principle' that was beyond the Federal Circuit's jurisdiction. See App., *infra*, 5A and see 22A:

> "These are the definitions against which the accused products must be compared to determine whether they infringe on claim 1 of the '720 patent."

The district court judge merely identified names in the claim with the specification, but the district court judge did not construe "a vaginal swab" "a core member", "an outer housing" or adsorbent member" ***with the elements in claim 1***

See *Pfaf v. Wells Electronics, Inc cited* at 6A and 21A.

which thereby goes against the controlling law that

> "[T]he doctrine of equivalents" should be applied as an objective inquiry on an *element- by- element* basis" *Warner Jenkins* 117 S.Ct. 1040. 1044, 1054.

The district court's above definitions as "terms" were deferred to the Federal Circuit with Judge Chasanow *citing a change in* Markman v. Westview Instruments, Inc., 52 F3d. 967, (Fed. Cir. 1995) 979 (en banc), aff'd.:

> "[a]s it is well-settled that claim construction is a matter of law for **the court** to decide. Id." at App. 10A.[9]

Thus, when the Federal Circuit agreed only to affirm "terms", and did not review these terms *with the elements* in the claim nor enforce the law 35 U.S.C. §112, ¶2, the district court's *above change in controlling law* became a "subversion":

> **Because** claim construction is a matter of law, **the construction given the claims is [and must be] reviewed, *de novo*, on appeal."** See Markman v. Westview Instruments, Inc., 52 F3d. 967, (Fed. Cir. 1995) 979 (en banc), aff'd. 517 U.S. 370 (1996).

Since the Federal Circuit and the US PTO are jointly responsible for the overall administration of the patent system, claim construction, *de novo*, is what sustains the

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[9] See "Claim construction is correctly a matter of law for the court to decide. Id." at App. 19-20A and 59A. "Claim construction is properly a matter of law before the court." App. 43A.

dignity in this part of the judicial process. Departure from this accepted and usual course of proceedings wreaks havoc. The Federal Circuit did not read the record in the US PTO, for them, to know that no amendments were made in the patent. Instead, the Federal Circuit has twice denied "due process in claim construction " thereby deviating so far from the norm it is orbiting into immense space. The Federal Circuit is in direct conflict with the controlling law, as well as, other decisions in the US Court of Appeals that supports a full *de novo* review for claim construction, on appeal:

> "Because claim construction is a matter of law, the construction given the claims is reviewed, *de novo*, on appeal." See Markman v. Westview Instruments, Inc., 52 F3d. 967, (Fed. Cir. 1995) 979 (en banc), aff'd. "Claim construction is a matter of law, which we review *de novo*." See Alpex Computer Corp. v. Ninetendo Co. Ltd. 102 F3d. 1214 (Fed. Cir. 1996) 1218:*citing Markman.* "The first step, claim construction, is a matter of law, which we review *de novo*."See Vitronics Corp. v. Conceptronic, Inc., 90 F. 3d. 1576 (Fed. Cir. 1996). 1582.*citing Markman.* "On appellate review the Federal Circuit *again* construes the claims, determining *de novo* the correct construction." See Multiform Desiccants Inc. v. Medzam Ltd., 133 F3d. 1473 (Fed. Cir. 1998). 1476. "[o]ur infringement analysis involves only claim

> construction, a question of law which we review *de novo."* See Gentry Gallery, Inc. v. Berkline Corp. 134 F3d. 1473 (Fed. Cir. 1998) 1476 *Citing Markman.* "Claim construction is a question of law, reviewed non-deferentially on appeal." See Mas Hamilton Group v. LaGard Inc. 156 F3d. 1206 (Fed. Cir. 1998) 1211 citing *Cybor Corp. v. FAS Techs., Inc.* 138 F3d. 1448,1456(Fed. Cir. 1998) ("holding "we review claim construction *de novo* on appeal".) "The first step, claim construction, is a question of law, which we review *de novo*." See Georgia-Pacific v. US Gypsum Co. 195 F3d. 1322 (Fed. Cir. 1999). 1330. "Claim construction is a question of law that this court reviews *de novo.*" See Texas Digital Systems v. Telegenex, 308 F3d. 1193 (Fed. Cir. 2002) 1201.

Hence, the district court judge *"hushed the* law" by making a change in *Markman* "[c]laim construction [is for the court to decide]" rather than "[c]laim construction [is reviewed *de novo* on appeal"]. Judge Chasanow misguided the law in such a way that the Federal Circuit forbears its duty and obligation. The Federal Circuit [held back] or withheld the progress that relies upon a full *de novo* review so that both of the lower courts violated the first and fourth amendment right "to a hearing" and "right to be secure in the intellectual

property".[10] For this reason, the supervisory power in the Supreme Court must be faithful to the patent laws in this unique process under 35 U.S.C. §112, ¶2. In this way, it is law-abiding that

> "The Supreme Court refused to apply prosecution history estoppel regardless of the reason for amendment, expressly because to do so would "subvert the various balances"..." FestoCorp. v. Shoeketsu Kinzoku Kogyo Kabushiki 234 F3d. 558 (Fed. Cir. 2000) 619.

However, in the '720 patent, there are no amendments. In other words, "no amendments –no prosecution history estoppel". "In cases where a patentees amendments were not required in response to an examiners rejection or critical to the allowance of the claims **no estoppel has been found**" in Georgia-Pacific v. US Gypsum Co. 195 F3d. 1322 (Fed. Cir. 1999), 1333. Hemphill did not narrow the claims and Hemphill did not limit the scope. See App. *infra*, 34A-38A in Hemphill v. McNeil-PPC, Inc. 25 Fed. Appx. 915, 2001 WL 1504561 (Fed. Cir.2002). The supervisory power in the Supreme Court is petitioned because

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[10] The citation of the Maryland Local Rule 105.6 "...**no hearing** deemed necessary" is ***screaming*** with violations of the first, seventh and fourteenth amendment rights 'to speak and be heard at jury trial' in Hemphill v. McNeil-PPC, Inc., 134 F. Supp. 2d. 719 (D. Md. 2001). See e.g., App., *infra*, 8A, 12A and 48A.

> "[t]he majority recasts "prosecution history estoppel" in a legally incorrect and equitably unjust manner." *Festo Corp.* 631. "[i]mposing an absolute estoppel against equivalency- instead of sharpening the criteria for determining equivalency (as the Supreme Court instructed) -make manifest the magnitude of the majority's ***change in the law***." FestoCorp. v. Shoeketsu Kinzoku Kogyo Kabushiki 234 F3d. 558 (Fed. Cir. 2000) 631-632.

It is 'obvious error' the district court judge has not accomplished the patent law 35 U.S.C.§112,¶ 2 to evaluate the elements in the claim 1 and it is an exceptional showing of error' that the Federal Circuit did not protect the law 35 U.S.C.§112 to fulfill claim construction *de novo* on appeal. "[T]he Supreme Court undertakes *review* for obvious and exceptional showings of error", Graver Tank& Mfg. Co. v. Linde Air Products Co. 69 S. Ct. 537-538. Otherwise,

> "[T]he majority's new rule hands the unscrupulous copyist a free ride on potentially valuable patented technology..." "Such an unscrupulous copyist appropriates the substance of the invention while avoiding the letter of the claims, yet adds nothing to the technology." FestoCorp. v. Shoeketsu Kinzoku Kogyo Kabushiki 234 F3d. 558 (Fed. Cir. 2000). 626

B. The US Court of Appeals for the Federal Circuit has decided an important question of federal law that has not been, but should be settled by this Supreme Court.

This Supreme Court must be the first court to decide and settle the issue for a **range of equivalency.** It is a federal question involving federal law in claims that were never amended, as well as, *elements in the claim* that were never discussed. See App. *infra,*34A-38A. The district court conspired to apply prosecution history estoppel to claims that were not amended, then failed to interpret "range of equivalency" about the extraneous property limitations imposed. See App. *infra,* 60A-65A and see App. *infra,* 22A. "[Likewise], . . . imposing a complete and automatic bar to the doctrine of equivalents for claim limitations amended for patentability reasons will have adverse, unfair and unintended consequences." FestoCorp. v. Shoeketsu Kinzoku Kogyo Kabushiki 234 F3d. 558 (Fed. Cir. 2000) 619. Arbitrarily imposing a prosecution history estoppel, regardless to whether the claims are amended or not, encroaches upon the rights of the patentee/applicant. The district court judge places 'unfair burden' on the patent owner to further prove claims that respectively have presumption of validity. Application of a prosecution history estopp l based on assumptions that a claim is "usually" amended is legal mischief setting out to undo the system. See App. *infra,*

48A - 53A. Here, it is only fair to understand **"why"** the judge resorts to such inequity in this case. The reasoning may be predicated on a lack of readiness or failed communication:

> "Because the Supreme Court has not fully addressed the range of equivalents . . . we must independently decide the issues. " FestoCorp. v. Shoeketsu Kinzoku Kogyo Kabushiki 234 F3d. 558 (Fed. Cir. 2000)571.

However, courts do not usually render judgements based on "choosing terms" or "naming names in a claim" without construing *all the elements* **in the claim.** "Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to the individual elements of the claims . . . " *Warner-Jenkins 117 S. Ct. 1040, 1049.* Instead, the Federal Circuit sought to "[a]ccommodate regional circuit law to procedural issues that are not themselves substantive patent law issues." Techsearch, LLC v. Intel Corp. 286 F.3d. 1360 (Fed. Cir. 2002) 1377. If the Federal Circuit assumes that claims 1 and 2 are identical via some "general collateral estoppel principle" from the Fourth Circuit, then the Federal Circuit must please be careful not to vitiate the *elements in the claims* themselves. App. 4A-6A. The *elements in a claim* make the two claims in the '720 patent "not identical":

("Both this Court and the Supreme Court have made clear that *all elements of a patent claim* are material with no single part of a claim being more important or 'essential' than another.") Markman v. Westview Instruments, Inc. 52 F3d. 967 (Fed. Cir 1995) 988. By granting a writ of mandamus, "[t]he doctrine of equivalents should be [and must be] applied as an objective inquiry on an element- by- element basis" *Warner Jenkins* 117 S.Ct. 1040. 1044, 1054. [12] The four portions or components/parts to be a *vaginal swab* are based upon "terms" that the Federal Circuit affirmed and as the element in claim 1 reads in the '720 patent for:

"A *vaginal swab comprised of*. . . [13]

"A vaginal swab will have many uses because the way the consumer makes use of a vaginal swab is entirely up to them"[14] The term "vaginal" is being construed "to cleanse or

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[12] The writ persuades the court to perform claim construction that is 'entire' or 'whole': a) having no part excluded or left out; b) with no reservations or limitations; c) containing all components; complete.

[13] The transitional term *comprising* is **inclusive or open-ended and does not exclude** additional, un-recited elements or method steps." See Georgia-Pacific v. US Gypsum Co. 195 F3d. 1322 (Fed. Cir. 1999). 1327. See Manual of Patent Examining Procedure in patent law: See§2111.03 (6th ed. 1997).

[14] [A]n elongated structure ↔or ↕... simply means the structure is longer than it is wide.

treat vaginal area." App., *infra*, 4A,¶1. The words "internal" or "external" are not limitations in the claim:

> "It is improper for a court to add extraneous limitations added wholly apart from any need to **interpret what the patentee meant** by particular words or phrases **in the claim**" Renishaw PLC v. Marposs Societa Per Azioni , 158 F3d. 1243 (Fed. Cir. 1998). "...reading the words in such a confined way would mandate the wrong result and would violate our proscription of not reading limitations from the specification into the claims" Texas Digital Systems v. Telegenex , 308 F3d. 1193 (Fed. Cir. 2002) "Where a specification does not require a limitation that limitation should not be read into the claims." "We know of no principle of law which would authorize us to read into a claim an element which is not present" E.I. DuPont De Nemours & Co. Phillips Petro. 849 F2d. 1430 (Fed. Cir. 1998) 1433.
>
> Claim 1 reads: *"adsorbent member being secured to said core member.."* [14]
> The accused devices have an [adsorbent member].

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[14] The element in claim 2 reads *"...at least one layer of said porous material...said core member and the said porous padding secured thereto . . . "*

It is the "[a]bsorbent material with a flexible thin porous membrane that covers over or around a flexible sheet [as core member] but does not cover-up for the annular band in Col. 5, ll.36-38 in the '720 patent. See App. 30A. To clarify *the way of absorbing,* the US PTO cited prior art Alvarez 4,177, 811 Patent. The US PTO agreed: "... in which an absorbent member is enclosed therein" at App. 99A *"Decision"* ¶3,[15] The function of an adsorbency characteristic is: two fibers working together which *helps improve absorbing.* See "adsorbent pad or layer is secured" in Col. 2, ll. 5-8 in the '720 patent. The accused devices function "to keep one clean" "to help reduce odors and odor causing ammonia"or "keeping one fresh and clean" etc.. See App., *infra*, 65A-66A.

> "[The accused devices] are the same, even if they differ in name, form or shape" Union Paper-Bag Machine Co. v. Murphy, 97 U.S. 120,125, 24 L. Ed., 935 (1878).

CORE MEMBER. The element in claim 1 reads: "core member being ***secured within*** *said housing...*" whereas, the element in claim 2 reads:
"a core member is being ***secured to*** *said housing means..*"
In claim 1, a core member "secured within said housing" is a

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[15] See Dri-weave® in Always®, Dry Touch Layer or Dry Layer Plus ® in Poise® and Kotex ®. Stayfree ® Carefree ® and Serenity ® have Silky Clean Cover ®, and Dry Cottony Cover ®.

unit as [a core member, adsorbent member and housing] in Col. 6, ll. 39-40, and/or, the unit is [a core member and adsorbent member] that is capsuled in Col. 5, ll. 32-33. [16] Only claim 2 has means-plus-function language, 35 U.S.C.§112,¶ 6, so that any restrictive role of narrowing claim 1 would not apply to

> "[t]he proviso that application of broad literal language of such claims must be limited to only those means that are "equivalen[t]" to the actual means shown in the patent specification.." *Warner-Jenkinson* 117 S. Ct. 1040, 1048.

The claims do not read "fairly rigid core member." In fact, in claim 2, the district court judge left out the law the US PTO cited *in re Donaldson Co.* 16 F3d. 1189 (Fed. Cir. 1994) as a stipulation for the courts to *look to* structure in species #4 in the Hemphill '720 patent, 35 U.S.C. §112, ¶6. See App., *infra,* 104A and 53A.[17] For this reason:

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[16] The accused devices named Tampax® and Security ®, at App. 17A, have [a core member and adsorbent member] as a unit within a closed end and open end outer housing. See App. Vol. 2, 384A. The accused devices such as the Kotex ® and Always® as maxi-pads etc., are a unit as [core member, adsorbent member and housing means] within outer housing. See App. Vol. 2, 385A.

[17] The Federal Circuit affirmed structure as a stick or wire, *citing American Heritage Dictionary* 1810 (3d ed. **1992**); see also *Dorland's Medical Dictionary* 1617 (28th ed. **1994**). App. 22A.

"There is no basis for treating an infringing equivalent any differently from a device that infringes the express terms of the patent. Application of doctrine of equivalents is akin to determining literal infringement, and neither requires proof of intent." *Warner -Jenkins* 117 S. Ct. 1040, 1052.

"The proper time for evaluating *interchangeability*, whether an accused element is equivalent to a claimed element, is at the time of infringement."

The element in claim 1 reads: "*...an annular base*

To ascertain a core member in species #4:

See prior art Fielding 3,731,682 patent: ("...string or cord may be employed") in Col. 4, ll.35-40 at App. Vol. 2, 169A.

A core member taught in the prior art of McNair 4,285,343 patent was not relevant under 35 U.S.C. 102 and not relevant under 35 U.S.C. 103. App., *infra,* 99A-100A. This firm wooded stick or cudgel is short and heavy.

Prior art Srininvasan 3,973,567 patent was readable in claim 2. See a flat flexible sheet as a core member ("...may comprise a fluid impermeable sheet material such as polyethylene or polypropylene cellophane or other similar films"), Col. 4, ll.5-12 at App. Vol. 2, 331A. The structure was 'one-sided' in the '567 patent and not as good as the Hemphill '720 patent. App., *infra,* 101A, 102A and 104A. Thus, a cogent point of novelty in claim 2 in the '720 patent is a core member on that one side (102) is secured by this other side as "the housing means" (106) which is a form of control. See App. Vol. 2, 383A. Remarkably, only the Hemphill '720 patent has structure *worthy* to be the housing means in claim 2 or as a closed end in claim 1.

with an outer diameter equal to the inner diameter of said annular band .." This structure is "OUTER HOUSING".[18] In fact, "the annular band" that is at, or around the base of the core member is 'the handle structure' described in the specification as: "providing protection for the swab while packaged and a handle during use to provide better control over swab [during or at some time in use]"in Col 2, ll. 1-4. On accused devices, the handle structure is the closed end in claim 1 or housing means in claim 2 [paper or plastic sheet] which is fitting within an open end outer housing [wrapper]. See e.g., App 30A.

> "The Supreme Court does not limit the doctrine of equivalents "to equivalents that are disclosed within the patents itself, reasoning that the "proper time for evaluating equivalency . . . is at the time of infringement, not at the time the patent was issued." 117 S. Ct. 1040 FestoCorp. v. Shoeketsu Kinzoku Kogyo Kabushiki 234 F3d. 558 (Fed. Cir. 2000) 566.

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[18] See an outer housing in prior art Bower 4,159,718 patent in Col. 1, ll. 29-31. ("...comprising two **rectangular** sheets ...") in Col. 1, ll. 57-58 at App., Vol. 2, 197A.

See a cover in prior art Johansson 4,165,942 patent: ("...protective cover which can be opened up at one end ...and folded back to expose..") in Col. 1, ll. 48-55. App. Vol. 2, 20A1.

See a sheath in Schuster 4,157,709: "comprises an outer sheath, an intermediate tube slidable there within...."). Col. 2, ll. 60-66. App. Vol. 2, 190A.

A purpose or function of this structure is to keep dirty hands or sticky fingers away from the fibers.[19] The core member and adsorbent member will not fall away and dirty hands will not contaminate the fibers because the unit is safely and effectively capsulated within an open end outer housing [wrapper]. Such a receptacle is a protective covering from danger, risk **and** loss as the element in claim 1 reads: *"...a pair of hinged housing segments defined by a plurality of frangible seams . . . ".*[20]

The range of "use" can be interpreted "as for use" or "as for disposal" because claim 1 reads to *"removable members"* and claim 2 reads to *"two portions movable . . . when in said second position"* However, the Federal Circuit affirmed "terms" for an outer housing that is 'not to be removed' and 'functions as a handle' at App. 22A. In this way, the Federal Circuit affirmed claim 1 in the first position as the element in claim 1 reads " . . . *secured within said housing so that the adsorbent member and core member are enclosed therein* [or safely inside]".

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[19] Any addition of a 'gluey' or tacky substance on the 'accused', is irrelevant to the above element in the claim.

[20] The first position is secured until it is "essentially peeled away from an enclosing protecting relationship" in Col. 2, ll. 19-21 in the '720 Patent. See *frangible seams "116"* in App., Vol. 2.at 383A. Accused devices were *changed* **to become** like a vaginal swab for reasons of safety and effectiveness.

The accused devices have the admirable qualities and features of a vaginal swab as defined in the asserted claim 1 in the Hemphill '720 patent. Hemphill [has shown] "equivalence" between the elements of the Accused Products and the claimed elements of the '720 patent, Warner-Jenkinson, Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 21 (1997), by showing that the Accused Products "perform[ ] substantially the same function in substantially the same way to obtain the same result" as the claimed elements of the '720 patent which proves infringement under the doctrine of equivalents. Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 608 (1950).[22]

CONCLUSION

It is necessary the Supreme Court therefore conclude the circumstances are extraordinary under 28 U.S.C. 1651(a) and please grant the petition for writ of mandamus.

Respectfully submitted,

Allegra Hemphill, *pro se*
6217 Charnwood Drive
Rockville, Maryland 20852
(301) 897 - 2030

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[22] The district court judge allowed 'no hearing". Therefore, Hemphill provided actual exhibits of accused devices labeling the **four** components/ parts **to be** a vaginal swab, as well as, illustrations of the accused device(s) in a side by side comparison with the elements in the claims. See App. Vol. 2, 372-381A.

United States Court of Appeals for the Federal Circuit

03-1463

ALLEGRA D. HEMPHILL,

Plaintiff-Appellant,

v.

PROCTER & GAMBLE CO.,

Defendant-Appellee,

v.

KIMBERLY-CLARK CORPORATION

Defendant-Appellee.

RADER, BRYSON, and GAJARSA, Circuit Judges.

RADER, Circuit Judge.

DECIDED: JANUARY 15, 2004

JUDGEMENT ENTERED JANUARY 15, 2004

United States Court of Appeals for the Federal Circuit

03-1463

ALLEGRA D. HEMPHILL,

Plaintiff-Appellant,

v.

PROCTER & GAMBLE CO.,

Defendant-Appellee,

v.

KIMBERLY-CLARK CORPORATION

Defendant-Appellee.

JUDGEMENT

ON APPEAL from the United States District Court for the District of Maryland

IN CASE NO(S): 2002-3736

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

Jan15, 2004 /s/

/ksb

DATE Jan Horbaly, Clerk

ISSUED AS A MANDATE: MARCH 1, 2004

NOTE: Pursuant to Fed. Cir. 47.6, this disposition is not citable as precedent. It is public record.

United States Court of Appeals for the Federal Circuit

03-1463

ALLEGRA D. HEMPHILL,

Plaintiff-Appellant,

v.

PROCTER & GAMBLE CO.,

Defendant-Appellee,

v.

KIMBERLY-CLARK CORPORATION

Defendant-Appellee.

DECIDED: January 15, 2004

Before RADER, BRYSON, and GAJARSA, Circuit Judges.

RADER, Circuit Judge.

The United States District Court for the District of Maryland granted summary judgement of noninfrignement in favor of defendants-appellees Kimberly-Clark Corporation and The Procter & Gamble Company (appellees). The district court held that defendants' products do not infringe claim 1 of U.S. Patent No. 4,557,720 (The '720 patent) owned by pro se plaintiff-appellant Allegra Hemphill. Because the district court properly granted summary judgement, this court affirms.

BACKGROUND

In a previous action, appellant sued McNeil-PPC, Inc. alleging infringement of claim 2 of the '720 patent. The '720 patent claims a disposable vaginal swab or refresher used to cleanse or treat the vaginal area. The district court in that case construed various claim terms in claim 2 and granted summary judgement of noninfrignement in favor of McNeil-PPC. See Hemphill v. McNeil-PPC, Inc., 134 F. Supp. 2d. 719 (D. Md. 2001). This court affirmed that judgement in an unpublished decision dated November 27, 2001. See Hemphill v. McNeil-PPC, Inc., 25 Fed. Appx. 915 (Fed. Cir. 2001).

Appellant filed this action in late 2002 asserting claim 1 of the '720 patent. Claim 1 contains many of the same claim terms that this court construed in the previous action with respect to claim 2. The district court applied the doctrine of collateral estoppel to hold that the interpretation of claim terms in claim 2 in the prior action applies to those same terms in claim 1 in this action. The district court found no material factual dispute concerning the accused products and held, as a matter of law, that appellees' products do not infringe claim 1 under the required claim construction.

DISCUSSION

This court reviews a district's grant of summary judgement without deference. Because the application of general collateral estoppel principles is not a matter within

the exclusive jurisdiction of this court, this court must apply the law of the circuit in which the district court sits. Pharmacia & Upjohn Co. V. Mylan Pharms. Inc., 170 F3d. 1373, 1381 n.4 (Fed. Cir. 1999). Under the law of the Fourth Circuit, the application of collateral estoppel is a legal determination reviewed de novo. See Tutlle v. Arlington County School Bd., 195 F3d. 698, 703 (4th Cir. 1999). Collateral estoppel applies where:

(1) the issue sought to be precluded is identical to one previously litigated; (2) the issue [was] actually determined in the prior proceeding; (3) determination of the issue was a critical and necessary part of the decision in the prior proceeding; (4) the prior judgement [is] be final and valid; and (5) the party against whom estoppel is asserted...had a full and fair opportunity to litigate the issue in the previous forum." Sedlack v. Braswell Servs. Group Inc., 134 F. 3d. 219, 224 (4th Cir. 1998).

Appellant's appeal focuses solely on claim construction. Appellant seems to argue that the district court should have performed a de novo evaluation of the terms in claim 1 using intrinsic evidence from the patent rather than adopting portions of the claim construction of claim 2 from the previous litigation. To the contrary, the meaning of several claim terms in this litigation is identical to the meaning accorded those same terms in the earlier case. The earlier case litigated and decided the meaning of those terms in claim 1. Thus, the appellant has already received a full and fair opportunity to prove the meaning of those contested

terms. The district court in this case correctly determined that the claim construction from the earlier case governs many of the terms in this case as well. Appellant has not indicated any flaw in the district court's collateral estoppel analysis. The record shows that the district court's determination of the meaning of identical terms in the earlier case was essential to the judgement in that case. As noted, the parties had a full and fair opportunity to litigate the issues. Therefore, the district court in this case properly estopped the appellant from retrying those issues.

The district court correctly recognized that identical claim terms cannot be given a different meaning in different claims of the same patent unless the patent clearly provides otherwise. See Georgia-pacific Corp. v. United States Gypsum Co., 195 F3d. 1322, 1331 (Fed. Cir. 1999). Because the claim construction of claim 2 in the prior action satisfies the principles of collateral estoppel, it is applicable in this action. See Pfaff v. Wells Elecs., Inc., 5 F.3d. 514 (Fed. Cir. 1993). Consequently, claim terms in claim1 identical to terms defined in the previous action must carry that same meaning.

Appellant does not argue that the district court erred in applying the properly construed claims to the accused products. Appellant's arguments merely express disagreement with the interpretation of the claim terms in dispute. Again, those issues have been fully litigated, decided by the district court, and affirmed by this court. Therefore, this record presents no reason for this court to

depart from the earlier claim construction. This court perceives no error in the district court's summary judgement of noninfrignement. That judgement is, therefore, affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

REHEARING DENIED

ORDER and MEMORANDUM OPINION

Date of entry: JUNE 11, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

ORDER

For the reasons stated in the foregoing Memorandum Opinion , it is this 11th day of June 2003, by the United States District Court for the District of Maryland, ORDERED that:

1. Plaintiff's motion to alter or amend judgement

pursuant to Fed. R. Civ. P. 59(e) BE, and the same hereby IS, DENIED; and

2. The Clerk shall transmit copies of the Memorandum Opinion and this Order to Plaintiff and counsel for Defendants.

/s/

Deborah K. Chasanow
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

MEMORANDUM OPINION

Presently pending and ready for resolution is Plaintiff Allegra D. Hemphill's motion, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the court April 15, 2003 order granting Defendants' motions for summary judgement of noninfringement . The issues have been fully briefed and no hearing is deemed necessary. Local Rule 105.6. For reasons that follow, the court shall deny the motion.

I. Standard of review

"A motion for reconsideration [pursuant to Fed. R. Civ. P. 59(e) is granted only in limited circumstances." *Micorbix Biosystems, Inc. v. Biowhittaker, Inc.*, 184 F. Supp. 2d. 434, 436 (D.Md. 2000) . "[T]he federal courts

generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 451 (1982). It may be made for one of three reasons:

(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not [previously] available...; or (3) to correct a clear error of law or prevent manifest injustice. *Hill v. Braxton*, 277 F3d. 701, 708 (4th Cir. 2002). "[A] motion to reconsider is not a license to reargue the merits or present new evidence." *Royal Insurance Co. of America v. Miles & Stockbridge, P.C.* 142 F.Supp. 2d. 676, 677 n. 1 (D. Md. 2001), *citing RGI, Inc. v. Unified Indus., Inc.* 963 F2d. 658 (4th ir. 1992).

II. Analysis

Plaintiff's motion does not satisfy any of the three potential grounds for reconsideration under Rule 59(e). She has presented neither new evidence nor intervening changes in controlling law, nor has she established that the court's decision was clearly erroneous or resulted in manifest injustice. Rather, she proffers the same arguments regarding claim construction previously submitted in her opposition to Defendant's motions for summary judgement, which the court has already rejected. Thus, Plaintiff is attempting simply to reargue the merits of the case, which is not permissible under Rule 59(e) motion to alter or amend a judgement. Plaintiff's suggestion that the court erred in not allowing claim construction to be decided by a jury is

without merit, as it is well-settled that claim construction is a matter of law for the court to decide. See *Markman v. Westiview Instruments, Inc.*, 52 F3d. 967,979 (Fed. Cir. 1995)(en banc), aff'd, 517 U.S. 370 (1996).

III. Conclusion

For the foregoing reasons, the court will deny Plaintiff Allegra D. Hemphill's motion to alter or amend judgement. A separate Order will be entered.

/s/ Deborah K. Chasanow
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

FACT FINDING

ORDER and MEMORANDUM OPINION
ENTERED; April 15, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 15th day of April, 2003, by the United States District Court for the District of Maryland, ORDERED that:

1. Defendant's Motions for Summary Judgement BE, and the same hereby ARE, GRANTED;

2. JUDGEMENT BE, and the same hereby IS, ENTERED in favor of Defendants Kimberly-Clark Corporation and The Procter & Gamble Co., and against Plaintiff Allegra D. Hemphill;

3. Defendants' counterclaims for declaratory

judgements of noninfrignement BE, and the same hereby ARE, DISMISSED without prejudice; and

4. The Clerk shall transmit copies of the Memorandum Opinion and this Order to Plaintiff and Counsel for Defendants and CLOSE this case.

/s/_____
DEBORAH K. CHASANOW
United States District Judge

C/M 4/15/03

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT MARYLAND

ALLEGRA D. HEMPHILL

v. Civil Action No. DKC 2002-3726
(Exempt from ECF)

PROCTER & GAMBLE CO., et al.

MEMORANDUM OPINION

Presently pending and ready for resolution are the motions for summary judgment of noninfrignement filed by Defendants Kimberly-Clark Corporation ("Kimberly-Clark")
and The Protect & Gamble Co. ("Procter & Gamble"), as well as Defendants' counterclaims for declaratory judgements of noninfrignement. The issues have been fully briefed and no hearing is deemed necessary. Local Rule 105.6. For reasons, that follow, the court shall grant

Defendants' motions for summary judgement and dismiss the counterclaims without prejudice.

1. Background

A. Procedural History

This is the second lawsuit brought in this court by Plaintiff Allegra D. Hemphill against manufacturers of personal care products for alleged infringement of her US Patent No. 4,557,720 (the '720 patent"). In the first lawsuit, Hemphill v. McNeil-PPC, Inc., Civ. A. No. DKC 99-654 ("Hemphill I"), Plaintiff alleged that the defendants STAYFREE and CAREFREE feminine sanitary napkins and SERENITY adult napkins products infringed claim 2 of her '720 patent. In that case, after ruling on the meaning of the claim terms and concluding that the accused products do not infringe claim 2 of the '720 patent, the court granted the defendant's motion for summary judgement. See Hemphill v. McNeil-PPC, Inc., 134 F. Supp. 2d. 719 (D. Md. 2001). The Court of Appeals for the Federal Circuit affirmed the decision on November 27, 2001 in an unpublished opinion. 25 Fed. Appx. 915 (Fed. Cir. 2001).

In November 2002, Plaintiff filed the current action alleging infringement by Kimberly-Clark's KOTEX and POISE product lines and Procter & Gamble's ALWAYS and TAMPAX products lines ("the accused products")[1].

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[1]Although TAMPAX expressly mentioned in the complaint, Plaintiff's opposition suggests that she regards TAMPAX as an accused product, and Procter & Gamble has included the product in its summary judgement motion. See Paper no. 32,at 29; Ex. C3. Accordingly, the

Products bearing the KOTEX and ALWAYS brand names are feminine sanitary napkins. Products bearing the KOTEX SECURITY and TAMPAX brand names are tampons, and those bearing the POISE brand names are adult napkins.[2] Defendants Kimberly-Clark and Procter & Gamble filed separate motions for summary judgement of noninfrignement with regard to their accused products. Each Defendant has asserted a counterclaim for a declaratory judgement of noninfringement , but has said that it would consent to dismissal without prejudice of the counterclaim if its motion for summary judgement is granted.

B. Background of the '720 Patent

Plaintiff filed her application for the '720 patent with the Patent and Trademark Office ("PTO") on June 11, 1984, and her patent was subsequently issued on December 10,

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court will include TAMPAX in this opinion. The judgement motion with respect to the ALLDAYS pantiliner product and the ENVIVE miniform product which are not mentioned anywhere by the Plaintiff, but are included by the Defendant "for the sake of the completeness." The opinion will be limited to the allegedly infringing products actually before the court.

[2]Plaintiff's complaint accuses Kimberly-Clark's KOTEX of infringement, but does make clear whether she is referring to KOTEX sanitary napkins, KOTEX SECURITY tampons, or both. Her opposition, while not a model of clarity, suggests that she is accusing both types of products. The court's infringement analysis will therefore will include both KOTEX sanitary napkins and KOTEX SECURITY tampons.

1985. See paper no. 1, Ex. A. Bearing the title "Vaginal Applicator", the '720 patent describes a disposable vaginal swab or refresher meant either to cleanse or treat the vaginal area with fragrances, medications, germicide or deodorants. Id., Ex. A. Col. 1, lines 33-38. The '720 Patent has two independent claims, but only claim 1 is at issue in this litigation. The description contained in claim 1 of the Applicator is as follows:

1. A vaginal swab comprised of an outer housing having a closed and open end on opposing ends thereof, said housing including an annular band defining said open end and a plurality of frangible seams that together define a pair of removable members and a pair of housing segments hingably secured to said annular band following removal of said members, a swab core member having a predetermined exterior shape, said core member having an annular base with an outer diameter equal to the inner diameter of said annular band and an adsorbent member secured to said core member, said core member being secured within said housing so that said adsorbent member is enclosed therein. Id., Ex. A. Col. 6, line 1- Col. 7, line 5.

Claim 2, which was the claim at issue in Hemphill I, provides as follows:

2. A vaginal swab comprising an outer housing including an inner case member and an outer case member at least part of which is connected to and said overlies inner case member;
a core member, at least one layer of porous material secured

to said core member, and housing means for both supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions movable relative to one another between first and second positions for enclosing said core member when in said first position and for both, exposing said core member and the said porous padding secured thereto and for forming a handle for said swab when in said second position. Id., Ex. A, Col. 7, line 6 -Col. 8, line 10.

In addition to claiming a "vaginal swab", both claims require the "outer housing" and "core member" that were construed by the court in Hemphill I. [3]

C. Accused Products

KOTEX sanitary napkins, ALWAYS sanitary napkins and POISE adult napkins are sold in bags or boxes containing multiple napkins, which are individually wrapped in plastic. See Declaration of Herbert E. Grube, Paper no. 22, Ex. A1. ¶ 5 ("Grube Decl."); Declaration of Mary Jo Myer, Paper no. 22 Ex. A2, ¶ 5 ("Meyer Decl."); Declaration of Thomas W. Osborn III, paper no. 23, Ex. 2, ¶ 4 ("Osborn Decl."). The sanitary napkins are composed of an absorbent core material placed between a flexible liquid pervious topsheet and a liquid-impervious plastic backsheet that has an adhesive on the outside for attaching the napkin to an undergarment. See Grube Decl. ¶ 6; Meyer Decl. ¶ 6;

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[3]For a description of the prosecution history of the '720 patent and the reexamination proceedings, see Hemphill I, 134 F. Supp. 2d. At 721-23.

Osborn Decl. ¶ ¶ 4-5. The side of the plastic backsheet containing the adhesive has a thin paper sheet to it to protect the adhesive. See Grube Decl ¶ 6; Meyer Decl.¶ 7; Osborn Decl.¶ 5.

In order to use the sanitary napkins, the consumer removes the plastic wrapper from the product, peels off the thin paper sheet, and affixes the adhesive side to the undergarment. See Grube Decl. ¶7; Meyer Decl.¶ 8; Osborn Decl. ¶¶ 6-7. The napkins are intended to passively collect fluid during use. See Grube Decl. ¶9; Meyer Decl. ¶ 10; Osborn Decl. ¶ 7. The napkins are not designed to be used or placed internally into the vagina. See Grube Decl.¶ 11; Meyer Decl. ¶ 12; Osborn Decl. ¶ 9. After use, the consumer removes the napkin from the undergarment and discards it, either directly or by first wrapping it in the plastic wrapper of the next napkin.. See Grube Decl.¶ 8; Meyer Decl. ¶ 9; Osborn Decl.¶ 8.

KOTEX SECURITY tampons and TAMPAX tampons are also generally sold in bags or boxes containing multiple individually-wrapped tampons. See Grube Decl.¶ 16; Osborn Decl. ¶21. Each tampons is composed of a piece of absorbent material made from cotton and or rayon surrounded by a liquid pervious overwrap. A string is attached to the bottom of the absorbent piece, which is compressed into a plastic applicator. See Grube Decl. ¶17; Osborn Decl. ¶ 20. To use the tampon the customer removes the plastic wrapper, inserts the applicator into the vagina and expels the tampon from the applicator into the

vagina by pressing the inner tube up into the outer tube. See Grube Decl. ¶ ¶18-19; Osborn Decl. ¶ 23. The applicator is then removed, leaving the tampon in the vagina to passively collect fluid. See Grube Decl. ¶19; Osborn Decl. ¶ 23. After use, the consumer removes the tampon by pulling on the string and then discard it either directly or by wrapping the used tampon in the plastic wrapper of the next tampon. See Grube Decl. ¶10; Osborn Decl.¶ 23.

II. Standard of Review

In patent cases, as well as in other cases, a motion for summary judgement will be granted only if there exists no genuine issues as to any material fact and the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56(c); *Anderson V. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986): *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986): *Clark v. Alexander*, 85 F3d. 146, 150 (4th Cir. 1996). The moving party bears the burden of showing that there is no genuine issue of material fact. Fed. R. Civ. P 56(c): *Pulliam* 810 F2d. 1286 (*citing Charbonnages de France v. Smith*, 597 F2d. 406, 414 (4th Cir. 1979).

When ruling on a motion for summary judgement the court must draw all reasonable inferences in favor of and construe the facts in the light most favorable to the non-moving party. *Tinsley v. First Union Nat'l Bank*, 155 F3d. 435, 437 (4th Cir. 1998). A properly supported motion for summary judgement may not be defeated by "the mere existence of some alleged factual dispute between the parties". *Anderson* , 477 U.S. at 247-48. Further, while the

court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case, the requirement of liberal construction does not mean that the court can assume the existence of a genuine issue of material fact where none exists. *Weller v. Dept. of Social Services*, 901 F. 2d. 387, 391 (4th Cir. 1990); *Beaudett v. City of Hampton*, 775, 775 F2d. 1274, 1277 (4th Cir. 1985).

Although an infringement analysis usually involves both fact and law, summary judgement of noninfrignement may still be proper. *Nike, Inc. v. Wolverine Worldwide, Inc.*, 43 F3d. 644, 646 (Fed. Cir. 1994); *Chemical Eng'g Corp. v. Essef Indus. Inc.*, 795 F2d. 1565, 1571 (Fed. Cir. 1986). A good faith dispute about the meanings and scope of asserted claims does not, in and of itself, create a genuine dispute to preclude summary judgement in patent cases. *Lantech Inc. v. Keip Mach. Co.*, 32 F.3d. 542, 546 (Fed. Cir. 1994).

III. Analysis

Plaintiff alleges that the accused products infringe on claim 1 of the '720 patent. In order to assess Defendants' motions for summary judgement of noninfrignement, the court must engage in a two-step infringement analysis. "The first step is determining the meaning and the scope of the patent claim asserted to be infringed. The second step is comparing the properly construed claims to the device accused of infringing. *Markman v. Westview Instruments, Inc.* 52 F.3d. 867, 979 (Fed. Cir. 1995); *en banc, aff'd* 517 U.S. 370 (1996). Claim construction is correctly a matter of

law for the court to decide. Id. When construing a claim a court should look to the intrinsic evidence, i.e., the patent itself, its claims, written description, and the prosecution history. See *Vitronics Corp. v. Conceptronic, Inc.* 90 F3d. 1576, 1582 (Fed. Cir. 1996). Additionally, statements made during the reissue [reexamination] proceeding "are relevant prosecution history when interpreting claims." *E. I. Du Pont de Nemours & Co. v. Phillip Petroleum Co.*, 849 F2d. 1430, 1439 (Fed. Cir. 1988). Prosecution history need not relate to the particular claim at issue in a claim in order to be relevant, so long as the prosecution history in question relates to the same claim term as in the asserted claims. See *Alpex Computer Corp. v. Nintendo Co.*, 102 F.3d. 1214, 1220 (Fed. Cir. 1996).

A. Claim Construction

In Hemphill I, the court construed the terms "vaginal swab". "outer housing", and "core member," and the Federal Circuit affirmed these constructions. Defendants argue that under the doctrine of collateral estoppel, or issue preclusion, the meaning of these terms as construed by the court in Hemphill I must apply in the instant case as well. There are four factors that must be met for collateral estoppel to apply: (1) the issue was identical to one decided in an earlier action; (2) the issue was actually litigated in earlier action; (3) resolution of the issue was essential to a final judgement on the merits and (4) the plaintiff had a full and fair opportunity to litigate the issue in the earlier action. See *Molinaro v. Fannon/Courier Corp.*, 745 F.2d. 651, 655

(Fed. Cir. 1984); *A.B. Dick Co. v. Burroughs Corp.* , 713 F.2d. 700, 704-704, (Fed. Cir. 1983). The Federal Circuit has held that collateral estoppel applies to issues of claim construction. Specifically, '"where a determination of the scope of the patent claims was made in a prior case, and the determination was essential to the judgement thereon the issue of infringement there is collateral estoppel in a later case on the scope on such claims.'" *Pfaff v. Wells Electronics, Inc.*, 5 F3d. 514, (Fed Cir. 1993), *quoting Molinaro*, 745 F2d. At 655.

Plaintiff's opposition appears to focus solely on the first required factor for collateral estoppel. Plaintiff argues that collateral estoppel to claim construction in this suit because the first suit pertained to alleged infringement of claim 2, while this suit concerns claim 1. However, the claim terms construed in Hemphill I, appear in both claims 1 and claim 2. It is well-settled law that unless the patent provides otherwise, a claim term cannot be given a different meaning in various claims of the same patent. See *Georgia-Pacific Corp. v. United States Gypsum Co.*, 195 F.3d. 1322, 1331 (Fed., Cir 1999); *Southwall Tech., Inc. v. Cardinal IG Co.*, 54 F.3d. 1570, 1579 (Fed. Cir. 1995). Plaintiff has not demonstrated that anything in the patent requires that terms be given a different construction in claim 1 than in claim 2. Thus, the issue in this suit, i.e., the meaning of "vaginal swab", "outer housing", and "core member," is the same issue already decided in Hemphill I. Plaintiff's attempt to describe claim 1 as "structural" in order to distinguish it

from claim 2 is unpersuasive, in part because claim 2 is also a structural claim (as opposed to a process or method claim).

Because the requirements for collateral estoppel have been met, the claim construction established in Hemphill I, must be given collateral estoppel effect on claim construction in this case. Accordingly, Plaintiff is collaterally estopped from arguing, as she tries to do in her opposition motion, for a new construction of the claim terms "vaginal swab", "outer housing" and "core member".

In Hemphill I, the court construed "vaginal swab" as "a small piece of absorbent material attached to the end of a stick or wire and used for cleansing or applying medicine," meant to be used within the vaginal canal. [4] See Hemphill I, 134 F. Supp 2d. At 726-27, *citing American Heritage Dictionary* 1810 (3d ed. 1992); see also *Dorland's Medical Dictionary* 1617 (28th ed. 1994). The court construed the term "outer housing" as a device that serves as a handle structure for the use of the swab and is not designed to be removed and thrown away. Id. At 727. "Core member" was construed by the court as "a fairly rigid core member with an annular band or ring at its base that can fit into the band or ring of the outer housing," Id. These are the definitions against which the accused products must be compared to determine whether they infringe on claim 1 of the '720 patent.

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[4]The court expressly rejected the argument that Plaintiff again tries to make in this case that "vaginal" refers to the outer housing as the cover or sheath. 134 F.Supp 2d. At 726.

B. Comparison to Accused Products

1. Literal Infringement

A claim of literal infringement requires proof that the accused devices meet every limitation of the properly construed claims. See *Gentry Gallery, Inc. v. Berkline Corp.*, 134 F. 3d. 1473, 1476 (Fed. Cir. 1998). "If even one limitation is missing or not met as claimed, there is no literal infringement." *Mas-Hamilton Group v. LaGard Inc.*, 156 F.3d. 1206, 1211 (Fed. Cir. 1998). Defendants argue that because their products lack several limitations of claim 1, there can be no literal infringement as a matter of law.

a. KOTEX, POISE and ALWAYS sanitary napkins

Like the products in Hemphill I, the accused sanitary napkins in the current case do not function as "vaginal swab" as required by the claims in the '720 patent. Plaintiff herself has stated that her vaginal swab does not resemble, behave , or function like a sanitary napkin. See Paper 22, Ex. D1 at PTO 00440. As discussed earlier, the sanitary napkins are intended to cover a portion of an undergarment to passively collect fluid. They do not consist of a piece of absorbent material attached to the end of a stick or wire and are not designed for internal vaginal use. Indeed, they are neither the size nor shape that would allow for internal use.

Moreover, the structure of Plaintiff's invention differs greatly from the accused sanitary napkins. The

sanitary napkins do not have an "outer housing" structure that is designed to be utilized as a handle for the use of a swab, as required by the '720 claims. The accused sanitary napkins merely have a plastic outer wrapping that is thrown away once the napkin is utilized. At most, the discarded wrapper covers the used and soon-to be discarded napkin. The plastic wrapping is in no way equivalent to the handle function of the "outer housing" in Plaintiff's invention.

Additionally, the accused sanitary napkins lack a "fairly rigid" core member with an annular band or ring at its base that can fit into the band or ring of the outer housing. While the sanitary napkins do have an absorbent core, the core is soft and pliable, not "fairly rigid", and they do not have an annular band or ring that can fit into the band or ring of an outer housing. Given the absence of the foregoing elements from the accused sanitary napkins, Plaintiff has failed to establish that the accused products literally infringe upon her '720 patent.

B. KOTEX SECURITY and TAMPAX tampons

Similarly, Kimberly-Clark's KOTEX SECURITY tampons and Procter & Gamble's TAMPAX tampons do not literally infringe upon the '720 patent. Although they are intended for internal vaginal use, the accused tampons are not "swabs". They do not consist of a small piece of absorbent material attached to the end of a stick or wire; the string attached to the tampons only allows the user to remove the tampon, not to manipulate it. In addition, the

tampons are designed to absorb menses, not to clean or apply medicine.

Furthermore, the accused tampons do not have an "outer housing" structure that is designed to be used as a handle for the swab, as required by the '720 claims. The tampon applicator does not transform into a handle after the tampon is inserted, but is instead designed to be completely removed and thrown away. Finally, the accused tampons lack a core member with an annular band or ring at the base that can fit into the band or ring of an outer housing. Because the accused tampons lack several elements, they too do not literally infringe on claim 1 of the '720 patent.

2. Doctrine of Equivalents

Under the doctrine of equivalents, a product which does not literally infringe upon the express terms of a patent may nonetheless infringe if there is "equivalence" between the elements of the accused products and the claimed elements, of the patent. *Zelinski v. Brunswick Corp.*, 185 F.3d. 1311, 1316 (Fed. Cir. 1996), *citing Warner-Jenkinson, Inc. v. Hilton Davis Chem Co.* 520 U.S. 17, 21 (1997). Infringement occurs under the doctrine of equivalents if the difference between the particular element and the claim limitation are "insubstantial." Id. A test to determine "insubstantiality" is whether "the element performs substantially the same function in substantially the same way to obtain substantially the same result as the claim

limitation." Id., at 1316-17, *citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950).

Plaintiff has not demonstrated that the differences between the elements in claims 1 or 2 of the '720 patent and the accused products are insubstantial. Each of the accused products lacks numerous structural limitations of the '720 patent and serves a different function. As mentioned earlier, plaintiff herself noted during prosecution and reexamination proceedings that her invention, a vaginal swab, does not look, behave or function like a sanitary napkin. See e.g., Paper no. 22, Ex. D1 at PTO 0040. Accordingly, the court finds that no reasonable jury could find there to be equivalence between the accused products and Plaintiff's invention.

IV. Conclusion

Because there is no genuine issue of material fact and Defendants are entitled to judgement as a matter of law, the court shall grant Defendants' motions for summary judgement of noninfringement . Defendants' counterclaims for declaratory judgements of noninfringement will be dismissed without prejudice. A separate Order will be entered.

/s/_____
DEBORAH K. CHASANOW
United States District Judge
April 15, 2003

UNITED STATES COURT of APPEALS
for the FEDERAL CIRCUIT

ALLEGRA D. HEMPHILL, Plaintiff-Appellant,

v.

MCNEIL-PPC, INC., Defendant -Appellee.

No. 01-1391

REHEARING DENIED

Date of entry December 21, 2001.

ORDER

Before CLEVENGER, GAJARSA, and DYK, Circuit Judges.

A petition for rehearing having been filed by the APPELLANT, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on December 28, 2001.

FOR THE COURT

"s_____"

Jan Horbaly

Clerk

Dated: December 21, 2001

cc: Allegra Hemphill

George F. Pappas

HEMPHILL V. MCNEIL-PPC, 01-1391

(DCT -99-CV-654)

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
DEC 21 2001
JAN HORBALY
Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

UNITED STATES COURT of APPEALS
for the FEDERAL CIRCUIT

ALLEGRA D. HEMPHILL Plaintiff-Appellant,

v.

MCNEIL-PPC, INC., Defendant -Appellee.

No. 01-1391

DECIDED NOVEMBER 27, 2001.

Before CLEVENGER, GAJARSA, and DYK, Circuit Judges. DYK, Circuit Judge.

Allegra Hemphill ("Hemphill") appeals the decision of the United States District Court of Maryland granting McNeil-PPC Inc.'s ("McNeil") motion for summary judgement that McNeil-s sanitary napkin products do not infringe Hemphill's U.S. Patent No. 4,557,720 (the "720 patent"). Hemphill v. McNeil-PPC, Inc., 134 F. Supp. 2d. 719 (D. Md. 2001). Because the

district court properly construed the asserted claim of the '720 patent and properly determined that McNeil's sanitary napkin products do not infringe that claim as matter of law, we affirm.

BACKGROUND

Hemphill is the inventor and patentee of the '720 patent, which relates to a "Vaginal Applicator". The patent describes a disposable vaginal swab or refresher meant either to cleanse or to treat the vaginal area with fragrances, medications, germicides, or deodorants. Col. 1, ll. 34-38. The '720 patent has two independent claims, but only claim 2 is at issue on appeal. Claim 2 of the '720 patent reads as follows:

> 2. A vaginal swab comprising an outer housing including an inner case member and outer case member at least part of which is connected to and overlies inner case member;
> a core member at least one layer of porous material secured to said core member, and housing means for supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions movable relative to one another between first and second positions for enclosing said core member when in said first position and for both exposing said core member and the said porous padding secured thereto and for forming a handle for said swab when in said second position.

'720 patent, col. 7, l. 6-col.8, l.10.

McNeil manufactures and sells several families of sanitary napkin products including Stayfree sanitary napkins, Carefree, sanitary napkins. Serenity adult napkins. For purposes of determining infringement. McNeil's Stayfree, Carefree, Serenity products (the "Accuse Products") are nearly identical in design. Hemphill, 134 F. Supp. 2d. At 723. The following description of the Accused Products is undisputed:

> The Accused [Products] are sold in multiple units in large plastic bags, inside of which are individual napkins packaged in plastic wrappers. Each of these individual units is composed of absorbent material with a flexible thin porous membrane that is attached on one side to a flexible plastic sheet that has an adhesive on the other side. In its packaging, the side of the plastic sheet containing the adhesive is attached to a thin paper sheet.
>
> In order to use the napkin, the consumer removes the plastic packaging, and peels off the thin paper sheet. Then, the consumer presses the side with the adhesive to the undergarment in order to attach the napkin to the undergarment. The napkin is intended to passively collect fluid during use. After use the consumer pulls on the napkin to peel it off of the undergarment, and then discards it, either directly or by first inserting the napkin into the plastic wrapper of the next napkin. The

> Accused [Products] are not designed to be used or placed internally in the vagina. They do not have handles, and do not have adsorbent material.

Id. At 723-34 (emphasis added) (citations omitted).

Hemphill sued McNeil in the United States District Court for the District of Maryland, alleging that several families of McNeil's sanitary napkin product lines infringe the '720 patent. McNeil moved for summary judgement of noninfrignement at the close of discovery.

The district court first construed claim2 of the '720 patent. Looking to the intrinsic evidence, the district court construed the claim language in light of the specification and prosecution history. Hemphill, 134 F. Supp. 2d. At 725-27. For example, the district court found that during the prosecution phase, Hemphill narrowed her claims to distinguish her invention from prior art. And further limited the scope of her invention during two re-examination proceedings. Id. At 721-722. On the basis of this intrinsic evidence, the district court interpreted claim 2 to require a "vaginal swab" to be used within the vaginal canal and to be comprised of four component parts: (1) an outer housing; (2) a core member; (3) at least one layer of porous material; and (4) a housing means. Id. At 728.

The district court then compared claim 2 as construed to the Accused Products, and concluded that the Accused Products, as a matter of law, did not infringe the '720 patent. Id. At 729. As for literal infringement, the

district court found that "the structure of [Hemphill's] invention differs vastly from the accused devices on each element." Id. At 728. As for infringement under the doctrine of equivalents, the district court found that Hemphill "failed to offer a single assertion illustrating that the difference between the elements of her invention and the accused devices is only insubstantial. Rather, the evidence establishes [that] the difference is vast." Id. At 729.

Accordingly, the district court granted McNeil's motion for summary judgement of noninfringement . Hemphill then filed a Motion for Reconsideration pursuant to District Court of Maryland Local Rule 105.10 and Federal Rule of Civil Procedure 60 seeking reconsideration of the entry of summary judgement. The district court treated her motion as Rule 59(e) Motion to Alter or Amend Judgement, and denied the motion.

Hemphill filed a timely pro se appeal. We have jurisdiction over this appeal pursuant to 28 U.S.C. 1295 (a)(1).

DISCUSSION

I. Claim Construction

Hemphill argues that the district court improperly construed claim 2 by "reading into" claim 2 "extraneous limitations from the specification", and by reading limitations into claim 2 that relate to claim1. McNeil responds that the district court properly looked to the specification and prosecution history to construe claim 2.

We agree.

In interpreting claims, a court "should look first to the intrinsic evidence of record, i.e. the patent itself, including the claims, the specification and, if in evidence the prosecution history." Vitronics Corp. v. Conceptronic, Inc., 90 F3d. 1576, 1582, 39 USPQ2d 1573, 1576 (Fed. Cir. 1996). It is well-settled that for purposes of claim construction, the specification may act as a sort of dictionary that explains the invention and may define terms used in claims. Markman v. Westview Instruments, Inc., 52 F.3d. 967, 979, 34 USPQ2d 1321, 1330 (Fed. Cir. 1995) (en banc), afff'd., 517 U.S. 370 (1996). When the meaning of a term used in a claim is sufficiently clear from its definition in the specification, that meaning shall apply. Multiform Desiccants, Inc. v. Medzam, Ltd., 133 F.3d. 1473, 1477, 45 USPQ2d 1429, 1432 (Fed. Cir. 1998). In this case, the district court properly looked to the specification for clarification of several terms which were not wholly defined in the claim language.

Similarly, the district court properly looked to the prosecution history of the '720 patent. Hemphill argues that "the district court construed] the wrong....claim" by reading into claim 2 limitations relating to claim 1. But even where the prosecution history does not relate to the particular claim at issue, it is proper for the district court to use that prosecution history to construe the claim at issue if the prosecution history relates to the same structure as the asserted claim. Alpex Computer v.

Nintendo Co., 102 F.3d. 1214, 1220 40 USPQ2d 1667, 1662 (Fed. Cir. 1996) ("[W]e discern no reason why prosecution history relating to the structure of...claim 1 is not pertinent to the same structure ...[in] claim 12 and 13".) It is well settled that "[p]rosecution history is relevant not only for purposes of prosecution history estoppel but also for construing the meaning and scope of the claims." Id. At 1220, 40 USPQ2d at 1671. Thus, like the specification, the prosecution history can act like a dictionary, Hoechst Celanese Corp. v. BP Chems. Ltd., 78 F.3d. 1575, 1578, 38 USPQ2d 1126, 1129 (Fed. Cir. 1996), cert. denied, 519 U.S. 911 (1996), and statements made during reexamination proceedings "are relevant prosecution history when interpreting claims." E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co., 849 F.2d. 1430, 1439 7USPQ2d 1129, 1136 (Fed. Cir. 1988), cert. denied, 488 U.S. 986 (1988). In this case, in construing claim 2, the district court relied on statements Hemphill made during prosecution of the '720 patent in which she narrowed her claims to overcome prior art. The district court also relied on Hemphill's statements, described below, that she made during two reexamination proceedings in which she further limited her claims to convince the PTO to reissue them. The district court properly relied on Hemphill's statements made during prosecution and during the reexamination proceedings, even though some of those statements related to the unasserted claim 1.

The district court construed the term "swab" to mean "a small piece of absorbent material attached to the end of a stick or wire and used for cleansing or applying medicine." Hemphill, 134 F. Supp. 2d. At 727. (quoting American Heritage Dictionary 1810 (3d ed. 1992). Hemphill argues that the term "vaginal" does not limit her invention to a swab meant for use inside the vaginal cavity, but instead "pertains to the outer housing as a cover or sheath". We agree with the district court. After determining that claim 2 "provides little guidance as to the terms 'vaginal' and 'swab,' the district court found that the "specification clarifies that [Hemphill] designed the 'vaginal swab' to enter into the vaginal cavity", and that the "specification defines the purpose of the invention as 'a truly portable, convenient, and disposable internal vaginal cleaning device or refresher." Id. At 726. Thus, the district court found that the specification limits the term "vaginal" to a "swab entering into the vaginal canal." Id. The district court also found that Hemphill distinguished her invention from prior art during prosecution by stating that the prior art lacked "an elongated structure for the swabbing element to be introduced into the vaginal cavity." Id. The district court accordingly precluded Hemphill from "claiming that her invention is not meant to enter into the vaginal cavity," and construed the term "vaginal" to mean " a swab entering into the vaginal canal". Id.

Finally, the district court relied on the following

dictionary definitions to determine the plain meaning of the term "swab"; American Heritage Dictionary, 1810 (3d ed. 1992) (defining "swab" as [a] small piece of absorbent material attached to the end of a stick or wire and used for cleansing or applying medicine"); Dorland's Medical Dictionary 1617 (28th ed. 1994) (defining "swab" as "a wad of cotton or other absorbent material firmly attached to the end of a wire or stick, used for apply medication, removing material, collecting bacteriological material, etc."). The fact that the PTO granted Hemphill's request for reexamination in light of a patent for wrapped sanitary napkins (U.S. Patent No. 3,973,567) (the "Srininvasan" patent) and reissued her patent over Srininvasan does not alter the proper construction of the term "vaginal swab," and does not persuade us to construe the term "vaginal swab" to cover wrapped sanitary napkins. We find that the district court properly construed the term "vaginal swab."

Next, the district court construed the term "outer housing" to require an outer housing that "functions as a handle for the use of the swab," and is "not designed to be removed and thrown away". Hemphill, 134 F. Supp. 2d at 727. Specifically, the district court found that during prosecution of the '720 patent, Hemphill distinguished her invention from U.S. Patent No. 2,393,677 (the '677 patent), noting that her "outer housing" transformed into a "handle structure", a metamorphosis absent from the invention of the '677 patent. Id. We find that the district

court properly construed the term "outer housing."

The district court then construed the term "core member" to require "a fairly rigid core member with an annular band or ring at its base that can fit into the band or ring of the outer housing." Id. The district court looked to Hemphill's statements during prosecution of the '720 patent to determine that the purpose of the "annular band" is "to keep sticky fingers off the fibers," and to possess "an outer diameter which is at least equal to the inner diameter" of the band attached to the outer housing, "so that the two can fit thereby allowing the core to be secured within the band by a suitable adhesive." Id. The specification described the core member as "fairly rigid," and secured to the outer housing. Id. We find that the district court properly construed the term "core member."

We agree with McNeil that the district court properly construed all terms of claim 2, as a matter of law.

II. Infringement

Hemphill's pro se appeal implicitly challenges the district court's grant of summary judgement of noninfrignement. To prove literal infringement, Hemphill must establish that the Accused Products contain each and every limitation of the asserted claim. See e.g., Maxwell v. J. Baker, Inc., 86 F.3d. 1098, 1105, 39 USPQ2d. 1001, 1004 (Fed. Cir. 1996), cert. denied, 520 U.S. 1115 (1997). Hemphill's sole discernible argument regarding infringement is based on an advertisement describing certain features of the Accused Products. Hemphill, 134

F. Supp. 2d. At 728. After comparing claim 2 to the Accused Products, the district court found that the limitations in claim 2 were not satisfied by the Accused Products.

First, as noted above, the district court found that the term "vaginal swab" limited the invention to "a small piece of absorbent material attached to the end of a stick or wire and used for cleansing or applying medicine," and meant to be used inside the vaginal canal. Id. At 727. The district court found that the Accused Products are not designed for use within the vaginal canal, and that a sanitary napkin is neither the size nor shape to allow for internal use. Id. At 728.

Second, as noted above, the district court found that the term "outer housing" limited the invention to a swab with a housing that "functions as a handle for the use of the swab," and is "not designed to be removed and thrown away." Id. At 727. The district court found that the Accused Products lack an outer housing as required by the '720 patent, and instead have an "outer wrapping that is discarded once the sanitary napkin is utilized." Id. At 728.

Finally, as noted above, the district court found that the term "core member" required a "fairly rigid core member with an annular band or ring at its base that can fit into the band or ring of the outer housing." Id. At 727. The district court found that the Accused Products lack both a rigid core and an annular band. Id. At 728.

We agree with the district court that no reasonable jury could find that these limitations recited in claim 2 are found in the Accused Products.

To prove infringement under the doctrine of equivalents, Hemphill must show "equivalence" between the elements of the Accused Products and the claimed elements of the '720 patent, Warner-Jenkinson, Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 21 (1997, by showing that the Accused Products "perform[ ] substantially the same function in substantially the same way to obtain the same result" as the claimed elements of the '720 patent. Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 608 (1950). Noting that Hemphill "failed to offer a single assertion illustrating that the difference between the elements of her invention and the accused devices is only insubstantial," the district court found that "no reasonable jury could find there to be equivalence between the elements of [Hemphill's] invention and the accused devices." Hemphill 134 F. Supp. 2d, at 729. There are simply no genuine issues of material fact regarding infringement, either literally or under the doctrine of equivalents.

III. Motion for Reconsideration

Hemphill also argues that the district court erroneously considered her Motion for reconsideration as a Rule 59(e) Motion to Alter or Amend Judgement. We do not understand how the district court's treatment of her motion as a motion under Rule 59(e) could possibly

constitute prejudicial error. Because the district court's decision to treat the motion as a Rule 59(e) motion did not prejudice Hemphill, we need not further address this issue, and we affirm the district court's dismissal of Hemphill's motion.

CONCLUSION

Because the district court's claim construction was not legally erroneous, and its infringement analysis was proper, the district court's grant of summary judgement of noninfrignement is

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEGRA D. HEMPHILL

v.

MCNEIL-PPC, INC.

Civil Action No. DKC 99-654

REHEARING

ORDER and MEMORANDUM OPINION

Date of Entry May 11, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEGRA D. HEMPHILL

v.

MCNEIL-PPC, INC.

Civil Action No. DKC 99-654

ORDER

In accordance with the accompanying Memorandum Opinion, IT IS this 11the day of May, 2001, by the United States District Court for the District of Maryland, ORDERED that:

1. Ms. Allegra Hemphill's Motion for Reconsideration BE, and the same IS, DENIED: and

2. The Clerk will transmit copies of the Memorandum Opinion and this Order to Magistrate Judge Day, to Plaintiff, and to counsel for the Defendant and CLOSE this case.

/s/ DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEGRA D. HEMPHILL

v.

MCNEIL-PPC, INC.

Civil Action No. DKC 99-654

MEMORANDUM OPINION

Presently pending is Plaintiff Allegra Hemphill's Motion for Reconsideration brought pursuant to Federal Rule of Civil Procedure 60(b) and Local Rule 105.10. Plaintiff, proceeding *pro se,* contests this court's order issued March 12, 2001. Paper No. 60. She primarily asserts that this court erred in construing claim 2 of her patent, United States Patent No. 4,557,720. The court rejects this contention and stands by its prior ruling. Accordingly, Plaintiff's Motion for Reconsideration shall be DENIED.

Motions for reconsideration are typically treated as Rule 59(e) motions to alter or amend judgement when filed within ten days from entry of judgement and as a Rule 60(b) motion if it is served more than ten days after the court's ruling. See *Dove v. CODESCO*, 569 F.3d. 807, 809 (4th Cir. 1978) (construing motion for reconsideration asa Rule 59(e) motion because the motion was served within ten days of entry of judgement and calls into question the correctness of that judgement; In *re Burnley,* 988 F.2d. 1,3,(4th Cir. 1992) (finding that a motion for reconsideration not filed within ten days of the

entry of judgement must be construed as a motion under 60(b) rather than 59(e). In the instant case, this court entered judgement on March 12, 2001, and Plaintiff filed this motion for reconsideration on March 20, 2001, well within the ten day limit. Thus, it appears this motion is governed by Rule 59(e) rather than Rule 60(b).[5]

The Fourth Circuit has identified three grounds for amending a prior judgement pursuant to Rule 59(e): 1) to accommodate an intervening change in controlling law; 2) to account for new evidence not available at trial; or 3) to correct a clear error or prevent manifest injustice. *E.E.O.C. v. Lockheed Martin Corp.*, 116 F.3d. 110, 112 (4th Cir 1997) (citing *Hutchinson v. Staton* 994 F.2d. 1076, 1081 (4th Cir. 1993)). It is undisputed there has been no intervening change in the law and that no new evidence has been set forth. Plaintiff's primary contention is that this court erred in construing her patent claim.

Claim construction is properly a matter of law before the court. *Markman v. Westview Instruments, Inc.* 52 F.3d. 967, 979 (Fed. Cir. 1995) (en banc), aff'd, 517 U.S. 370 (1996). When construing a claim, the court examines "the claims themselves, the written description

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[5] Even if the court construed this as a Rule 60(b) motion, it would fail. Plaintiff fails to offer any evidence supporting a basis for reconsideration as specified in Rule 60(b), such as mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud. Fed. R. Civ. P. 60(b).

portion of the specification, and the prosecution history." *Bell & Howell Doc. Mgmt. Co. v. Altek Sys.*, 132 F. 3d. 701,705 (Fed. Cir. 1997), reh'g denied Jan. 6, 1998; *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d. 1576, 1581-82 (Fed. Cir. 1996) ("The claims, specification, and file history...constitute the public record of the patentee's claim, a record on which the public is entitled to rely."). In construing claim 2, this court followed this procedure by looking at the claims themselves, the specification,, and the prosecution history.

Plaintiff contends that the court did not look to the words of the claim. However, this is simply not true as evidenced in the court's detailed opinion. Paper No. 60 at 14-18. Plaintiff also argues that the literal words of the claim should be compared to the accused devices prior to the court's construction of the claim. Courts, however, have been instructed first, to construe the claim and then, to determine whether the claim reads on the accused device. *Markman,* 52 F.3d. At 976. Thus, the court properly construed the claim before comparing the claim to the accused devices. [6]

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[6] Moreover, Plaintiff's various arguments within her motion for reconsideration directly contradict each other. For example, she begins by asserting that the term "vaginal swab" was adequately defined within the words of the claim itself. Paper No. 61 at 8. She then argues that a different dictionary definition should have used in the determination of the meaning of the term "vaginal swab". Id. At 18. Finally, she claims that the term "vaginal swab" is simply a title without its own significant

Additionally, a motion for reconsideration that merely revisits the same arguments already considered and rejected should be denied. *CNF Constructors, Inc. v. Donohoe Constr. Co.*, 57 F.3d. 395, 400 (4th Cir. 1995) (when "the motion seeks reconsideration of legal issues already addressed in an earlier ruling there are no grounds for relief); *Int'l Longhoremen's Assoc., AFL-CIO v. Cataneo Inc.*, 990 F.2d. 794, 801 (4th Cir. 1993) (denying motion for reconsideration brought by party "rehashing" the same arguments the court had rejected). Plaintiff's motion, in large part, simply reiterates arguments this court has addressed. Consequently, this court shall DENY Plaintiff's motion for reconsideration and a separate Order will be entered.

"s/_____
DEBORAH K. CHASANOW
United States District Judge
May 11, 2001.

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meaning. Id. At 20.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
ALLEGRA D. HEMPHILL

v.

MCNEIL-PPC, INC.
Civil Action No. DKC 99-654
FACT FINDING
ORDER AND MEMORANDUM OPINION
Date of Entry March 12, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
ALLEGRA D. HEMPHILL
v.
MCNEIL-PPC, INC.
Civil Action No. DKC 99-654

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 12th day of March, 2001, by the United States District Court for the District of Maryland, ORDERED that:

1. Johnson & Johnson Consumer Companies, Inc.'s Motion for Leave to Permissively Intervene BE, and the same hereby IS, DENIED:

2. McNeil-PPC. Inc.'s Motion for Summary Judgement BE, and the same hereby is GRANTED;

3. McNeil-PPC, Inc.'s Motion to Bifurcate BE, and the same hereby IS, DENIED AS MOOT:

4. JUDGEMENT BE, and the same hereby IS, ENTERED in favor of Defendant, McNeil-PPC, Inc., and against Plaintiff, Allegra Hemphill; and

5. The Clerk will transmit copies of the Memorandum Opinion and this Order to Magistrate Judge Day, to Plaintiff, and to counsel for the Defendant and proposed intervenor and CLOSE this case.

"s/_____

DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEGRA D. HEMPHILL v. MCNEIL-PPC, INC.

Civil Action No. DKC 99-654

Date of Entry March 12, 2001

MEMORANDUM OPINION

Plaintiff Allegra Hemphill, proceeding pro se, alleges that Defendant Johnson & Johnson, Inc. (Johnson and Johnson) manufactures and distributes products which infringe on her patent, U.S. Patent 4,557,720 ("the '720 patent"). [1] Presently pending and ready for resolution are three motions. Johnson & Johnson Consumer Companies,

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[1] **On February 14, 2000, this court ordered that McNeil-PPC, Inc. ("McNeil") replace Johnson & Johnson as party defendant** because McNeil is the entity responsible for the manufacture and distribution of the Stayfree, Carefree, and Serenity products at issue in this case. Paper No. 36.

Inc. (JJCCI") has filed a Motion for Leave to Permissively Intervene. Defendant McNeil has filed both a Motion for Summary Judgement for Noninfringement and a Motion to Bifurcate.[2] The issues are fully briefed and no hearing is deemed necessary. Local Rule 105.6 For the following reasons, the court shall deny JJCCI's Motion for Leave to Permissively Intervene and grant McNeil's Motion for Summary Judgement.[3]

I. Background

Ms. Hemphill filed her application for the '720 patent with the Patent and Trademarks Office ("PTO") on June 11, 1984, and her patent was subsequently issued on December 10, 1985. Paper No. 46, Ex. D1. Bearing the title "Vaginal Applicator", the '720 patent describes a disposable vaginal swab or refresher meant either to cleanse or to treat the vaginal area with fragrances, medications, germicides, or deodorants. Id., Col. 1, lines 33-38. The '720 Patent has two independent claims, but only claim 2 is at issue in this litigation. Id., Ex. B. Deposition of Allegra Hemphill ("Hemphill Depo"), 10. The description contained in claim 2 of the Applicator is

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[2] **The issue of non-infringement is the sole issue in McNeil's summary judgment motion because Defendant does not argue the validity or unenforceability of Plaintiff's patent.** Paper No. 57, 2 n.2.

[3] In light of this court's decision to grant McNeil's Motion for Summary Judgement, Defendant's Motion to Bifurcate is no longer applicable, and thus, the motion will be denied as moot.

as follows:

> a vaginal swab comprising an outer housing including an inner case member and an outer case member at least part of which is connected to and overlies inner case member;
>
> a core member, at least one layer of porous material secured to said core member, and housing means for supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions movable relative to one another between first and second positions for enclosing said core member when in said first position and for both, exposing said core member and the porous padding secured thereto and for forming a handle for said swab when in said second position.

Id. Ex. D1, Col. 7-8, lines 1-10.

A. Prosecution of the '720 Patent.

During the prosecution phase, Plaintiff narrowed her claims to distinguish her invention from prior art cited by the Examiner. For example, Plaintiff clarified the distinction between her invention and a patent awarded to M. Alvarez by explaining that:

[t]he Alvarez device does not allow for an elongated structure for the swabbing element to be introduced into the vaginal cavity nor does it provide a sufficient handle structure. Id., Ex. D10, PTO 00313. She also differentiated between the porous material specified

in the respective patents.

Alvarez teaches that a moisture absorbent layer is exposed after the protective covering is removed. There is a distinct difference between Absorbent and Adsorbent, to ab as in Alvarez, absorb is to take in, suck up, swallow, engross wholly, to take up or receive by chemical or actions as of gases or liquids, and to ad as in Hemphill to adsorb is to take up and hold, to gather gas or liquid or dissolved material on a surface.

Id., Ex. D6, PTO 000336 (emphasis added).

Additionally, Plaintiff distinguished the "housing" in her invention from the "housing" in the patent issued to Albert Gelardin for a Cosmetic Holder. Plaintiff noted:

> [t]he Hemphill device, after removing the outer housing serves as a handle structure, and still serves as a function for the device, unlike Gelardin that states that the cover is completely removed.

Id., Ex. D6 PTO 00342.

B. Reexamination of the '720 patent

On February 2, 1998, Plaintiff asked the PTO to re-examine her patent in light of the McNair patent ("McNair") for a Sanitary Napkin with wings. The description of the McNair patent states as follows:

The central element and side elements have fluid-impervious backing upon which is placed a thin layer adhesive which will not penetrate the absorbent materials placed thereon. The central element has a highly absorptive pad means whereas the absorptive means on

the side panels may be minimal. The backing element of the central portion of the invention contains a strip of adhesive covered by a protective tape until use.

Id., ex. E2, AH 0222. Plaintiff differentiated her invention from McNair by stating that "Hemphill [vaginal swab] improves absorbing on the McNair cover sheet because of an absorbency characteristic". Id., Ex. E1, AH 0230. Thus, the McNair patent required an absorbent porous sheet, whereas Plaintiff's patent specified adsorbent porous material.

Ultimately, the PTO denied Plaintiff's request for reexamination after finding that McNair patent "did not raise a substantial new question of patent ability." Id., E4, AH 0227. Specifically, the PTO stated that the McNair patent "discloses none of the structural features recited (on Plaintiff's claims)" in light of Plaintiff's invention having a particular core member and housing. Id.

Plaintiff also applied for reexamination of her patent on May 20, 1998, this time over a patent held by Srininvasan et al. Id., Ex. F2, U.S. Letters Patent No. 3,973,567 ("the Srininvasan patent). The Srininvasan patent describes a "wrapped" sanitary napkins that includes plastic outer packaging and a napkin that affixes to an undergarment using adhesive. The patent contains this description of the invention:

> A sanitary napkin having an adhesive element thereon for attaching to an undergarment is provided with means for protecting the napkin and

> the adhesive element prior to use and for disposing of the napkin after use. The means comprise providing the napkin with a wrapper sheet of flexible material overlying one major surface, and the sides of the napkin and at least partially overlapping on the second major surface of the napkin. The sheet is releasably adhered to and held in place by the adhesive element.

Id., Ex. F1, PTO 00509.

The PTO granted Plaintiff's request for reexamination, finding that "[a] substantial new question of patent ability affecting Claim 2" was raised by the Srininvasan patent. Id., Ex. F3, PTO 00481. Agreeing to compare claim 2 and the Srininvasan patent more closely, the PTO acknowledged the possibility that Srininvasan had the claimed structure, such as "a core member surrounded by a layer of porous material, an outer housing, and housing means with 2 positions (one position that protects the core member and another position that exposes the core member for use)." Id.

In an effort to get her claim reissued, Plaintiff stated the Srininvasan patent lacked both the "housing means" and "a band" at the base of the core member, found in her invention. Id., Ex. F4, PTO 00484. Plaintiff emphasized that the missing band was particularly significant to her invention because "[t]he band is the means or intermediary in ***both*** positions from the closed location to the open state", Id., Ex. F4, PTO 00486

(emphasis in original), allowing users "to keep sticky fingers off the fibers." Id., Ex. F2, PTO 00447. Furthermore, Plaintiff distinguished her vaginal swab by stating : [i]t should be well understood that **Hemphill does not behave, operate or function like a sanitary napkin. Srininvasan does not have the components or parts to be a vaginal swab.** Id., Ex. F2, PTO 00451. (emphasis in original.)

On January 26, 1999, the PTO issued a reexamination certificate for the '720 Patent over Srininvasan for the following reasons:

> Claim 1 of the patent to Hemphill (4557720) is considered patent able over the patent to Srininvasan, et al. (3973567) because Srininvasan simply does not disclose the claimed structure, such as an open end opposite a closed end, an annular band, and frangible seams.
>
> Claim 2 of the patent to Hemphill (4557720) is considered patent able over the patent to Srininvasan, et al. (3973567) because Srininvasan does not disclose the housing means of Hemphill and does not disclose a structure that could be considered equivalent to housing means of Hemphill. Id., Ex. Ff, PTO 00490.

According to Defendant, beginning in 1994 and continuing for the next four years, Plaintiff sent letters to Johnson & Johnson executives alleging that the company's sanitary and adult napkins incorporate her

patented technology. Specifically, Plaintiff has alleged that the Stayfree sanitary napkin, Carefree sanitary napkin , and Serenity adult napkin product lines infringe upon her patent.[4] Moreover, Plaintiff testified that she considers these respective product lines to be structurally equivalent to each other. Id., Ex. B, 363, 368, 372-74, 376077.

Defendant agrees that the three different product lines are nearly identical in design. Id., Ex. A, McCoy Decl., ¶5. Defendant has provided the following undisputed description of these products:

> The Accused Napkins are sold in multiple units in large plastic bags, inside of which are individual napkins packaged in plastic wrappers. (Ex. A, McCoy., ¶6). Each of these individual units is composed of absorbent material with a flexible thin porous membrane that is attached on one side to a flexible plastic sheet that has as adhesive on the other side. Id., ¶ 7. In its packaging, the side of the plastic sheet containing the adhesive is attached to a thin paper sheet. Id.,¶ 7. In order to use the napkin, the consumer removes the plastic packaging, and peels off the thin paper sheet. Id,¶ 9. Then the consumer presses the side with the

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[4] Although Plaintiff mentions in her deposition testimony that Band Aid brand adhesive bandage products also infringe upon her patent, she never actually argues this contention. This court construes Plaintiff's complaint as limited to products from the Stayfree, Carefree, and Serenity product lines.

adhesive element to the undergarment in order to attach the napkin to the undergarment. Id. The napkin is intended to passively collect fluid during use. Id., ¶10. After use, the consumer pulls on the napkin and then discards it, either directly or by first inserting the napkin into the plastic wrapper of the next napkin. Id., ¶11. The Accused Napkins are not designed to be used or placed internally in the vagina. Id.,¶12. They do not have handles, and do not have adsorbent material. Id., ¶ 13. Paper No. 46, 5.

II. Motion to Intervene

JJCCI has filed a motion for leave to permissively intervene pursuant to Rule 24(b). See Fed. R. Civ. P. 24(b). In October 1999 at her deposition, Plaintiff suggested that Band-Aid brand adhesive bandage products may also infringe upon her patent. These bandages are manufactured and/or distributed by JJCCI, another subsidiary of Johnson & Johnson, not by McNeil- the current party Defendant.

A. JJCCI's Motion for Leave to Permissively Intervene

Rule 24(b) (2) provides, in pertinent part:

Upon timely application anyone may be permitted to intervene in an action...when an applicant's claim or defense and the main action have a question of law or fact in common...In exercising its discretion, the court shall consider whether the

intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R.Civ. P. 24(b)(2). Thus, permissive intervention is appropriate in circumstances in which 1) the applicant is timely; 2) the moving party's claim or defense and the main action have a common question of law or fact; and 3) the proposed intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *Hill v. W. Electronic Co.*, 672 F2d. 381, 386 (4th Cir. 1982); 6 James Wm. Moore et al. *Moore's Federal Practice* § 24.10 (3ed. 1997).

B. Analysis

Although Plaintiff identified Band Aid brand adhesive bandages at her deposition taken October 18, 1999 as a product line allegedly infringing upon her patent, she never made this assertion again. Paper No. 53. Exhibit A, Hemphill Depo., 375-376. In fact, both Plaintiff's response to JJCI's motion for leave to permissively intervene and her opposition memorandum to McNeil's motion for summary judgement contains assertions that Stayfree, Carefree and Serenity product lines are the sole product lines she is litigating in this lawsuit. Paper NO. 48 at 5, Paper No. 55 at 1. Plaintiff does not assert that Band Aid products are within the identified accused products in her complaint or in any or her papers, thus, this court will not force her to litigate an issue she has not asserted.

Moreover, JJCI provides absolutely no explanation

for the eight month time lapse between receiving notice through Plaintiff's deposition testimony in October 1999 and filing the motion in May 2000. Plaintiff also asserts that JJCI's motion is untimely, particularly, in light of discovery closing on March 13, 2000. Thus, the court shall deny JJCI's motion for leave to permissively intervene.

II. McNeil-s Motion for Summary Judgement

A. Summary Judgement Standard

In patent cases, as well as in other cases, a motion for summary judgement will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986): *Clark v. Alexander*, 85 F.3d. 146, 150 (4th Cir. 1996). The moving party bears the burden of showing that there is no genuine issue of material fact. Fed. R.Civ. P. 56(c); *Pulliam* 810 F.2d. At 1286 (citing *Charbonnages de France v. Smith* 597 F.2d. 406, 414 (4th Cir. 1979)).

When ruling on a motion for summary judgement, the court must draw all reasonable inferences in favor of and construe the facts in the light most favorable to the non-moving party. *Tinsley v. First Union Nat'l Bank*, 155 F. 3d. 435, 437 (4th Cir. 1998). A properly supported motion for summary judgement may not be defeated by "the mere existence of some alleged factual dispute between the parties." *Anderson*, 477 U.S. at 247-48.

Further, while the court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case, the requirement of liberal construction does not mean that the court can assume the existence of a genuine issue of material fact where none exists. *Weller v. Dep't of Social Services*, 901 F.2d. 387, 391 (4th Cir. 1990): *Beaudett v. City of Hampton*, 775 F.2d. 1274, 1277 (4th Cir 1985).

Although an infringement analysis usually involves both questions of fact and law, summary judgement of noninfringement may still be proper. *Nike Inc., v. Wolverine Worldwide Inc.* 43 F.3d. 644, 646 (Fed. Cir. 1994); *Chemical Eng'g Corp. v. Essef Indus. Inc.*, 795 F2d. 1565, 1571 (Fed. Cir. 1986). A good faith dispute about the meaning and scope of asserted claims does not, in and of itself, create a genuine dispute to preclude summary judgement in patent cases. *Lantech, Inc. v. Kelp Mach. Co.*, 32 F. 3d. 542, 546 (Fed. Cir. 1994).

B. Analysis

Plaintiff alleges that McNeil's Stayfree, Carefree and Serenity product lines literally infringe her '720 patent. Defendant objects to this characterization by stating that the original design for these products existed prior to Hemphill's patent and that these products vary in both design and purpose compared to Hemphill's vaginal

applicator. [5]

In order to assess this motion, the court must engage in a two-step infringement analysis. "The first step is determining the meaning and scope of the patent claims asserted to be infringed. The second step is comparing the properly construed claims to the device accused of infringing." *Markman v. Westview Instruments, Inc.*, 52 F.3d. 967, 979 (Fed, Cir. 1995) (en banc), aff'd, 517 U.S. 370 (1996). Claim construction is correctly a matter of law for the court to decide. Id. When construing a claim, a court should look to the intrinsic evidence, i.e., the patent itself, its claims, written description and the prosecution history. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d. 1576, 1582 (Fed. Cir 1996). Additionally, statements made during the reissue [reexamination] proceeding "are relevant prosecution history when interpreting claims," *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d. 1430, 1439 (Fed. Cir. 1988).

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[5] Defendant asserts that all of the accused products arise from a Stayfree sanitary napkin sold in 1981, prior to the existence of the '720 patent. See Paper No. 46. Exhibit L, Stayfree Sanitary Napkin Manufacturing Specifications. Plaintiff, however, contends that the design of these accused products changed after she sent samples of her patented invention to Defendant 's parent company in an attempt to distribute her product commercially. Without reaching the question of whether the accused products were sold in the same form prior to the filing of the '720 patent, this court will analyze whether the products in their present form infringe Plaintiff's '720 patent.

1. Claim Construction

Claim construction begins with the words of the claim. *Bell Comm. Research, Inc. v. Vitalink Comm. Corp.*, 55 F.3d. 615, 619-620. (Fed. Cir. 1995). Moreover, claim terms are given their plain meaning unless the inventor , "choosing to be his or her own lexicographer," uses terms in a manner other than their ordinary meaning and clearly discloses these special or alternative meanings in the patent specification or file history. *Vitronics*, 90 F.3d. At 1582; *Beachwood v. Wiledwood Creative Products, Inc.*, 31 F.3d 1154, 1158 (Fed. Cir. 1994). Courts may rely on dictionary definitions when construing claim terms "so long as the dictionary definition does not contradict any definition found or ascertained by a reading of the patent documents." *Vitronics*, 90 F.3d. At 1582.

The parties agree that only claim 2 of the '720 patent is at issue. Claim 2 provides in pertinent part as follows:

> A vaginal swab comprising an outer housing including an inner case member and outer case member at least part of which is connected to and overlies inner case member;
>
> a core member at least one layer of porous material secured to said core member, and housing means for supporting and enclosing said core member, said core member being secured to said housing means, having at lest two portions

movable relative to one another between first and second positions for enclosing said core member when in said first position and for both exposing said core member and the said porous padding secured thereto and for forming a handle for said swab when in said second position.

Plaintiff has specifically identified the four component parts to the vaginal swab as : 1) outer housing; 2) core member, 3) at least one layer of porous material; and 4) a housing means. Paper No. 46, Ex. G.

a. Vagina Swab

Plaintiff asserts that the term "vaginal" refers to the outer housing as the cover or sheath, and, "swab" refers to the unit being used as either a swab to dry or absorb or an applicator to hold or apply treatment. Paper No. 55, 3. By contrast, Defendant offers a narrower definition that a "vaginal swab" is a stick or wire with a small piece of absorbent material attached the end of it, which is of a size and structure for cleansing or applying medicine within the vaginal canal.

While the claim provides little guidance as to the terms "vaginal" and "swab", the '720 patent specification clarifies that Plaintiff designed the "vaginal swab" to enter into the vaginal cavity. For an example, the specification defines the purpose of the invention as "a truly portable, convenient, and disposable internal vaginal cleansing device or refreshner." Paper No. 46, Exhibit F1, Col. 1, lines 46-48. Moreover, the invention in the '720 Patent is

designed to dry or absorb material in the internal vaginal area. Id., Col. 3, lines 5-6. In fact, the length of the average vaginal cavity establishes the approximate length of the swab, including the core and gauze material. Id., Col. 3, lines 50-54. From the prosecution history, Plaintiff also distinguished her invention on this particular point by statement that the invention Alvarez lacked "an elongated structure for the swabbing element to be introduced into the vaginal cavity." Id., Ex. D10, PTO 00313.

In the face of all of this evidence, Plaintiff will not be allowed to claim that her invention is not meant to enter into the vaginal cavity. After all, "a patentee may not construe a claim term one way during prosecution in order to obtain allowances of the patent and then in a different way during litigation in order to obtain a finding of infringement." *Knorr* Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp., No. CIV. A. 00-803-A, 2001 WL 179815m at 4 *4 (E. D. Va. 2001) citing *Southwall Technologies, Inc. v. Cardinal IG Co.*, 54 F.3d. 157-, 1579 (fed. Cir. 1995). Thus, the '720 patent limits the term "vaginal" to a swab entering into the vaginal canal.

As for "swab", the '720 patent states that a vaginal swab should preferably be "comprised of fairly rigid core member constructed either in segments of as a one piece unit, over which a thick gauze type absorbent pad or layer is secured". Paper Nol. 46, Ex. D1, Col. 2, lines 5-9. The

plain meaning of the term "swab" is "a small piece of absorbent material attached to the end of a stick or wire and used for cleansing or applying medicine." *American Heritage Dictionary* 1810 (3d.ed. 1992): *Dorland's Medical Dictionary* 1617 (28th ed. 1994).

B. Outer Housing & Housing Means

Plaintiff asserts that "outer housing" is the "packaging that protects [the swab] from danger, risk or loss in an enclosing or protecting relationship and the "housing means" is a part of the outer housing. Paper No. 55, 2. In claim 2, she states that the outer housing must have "an inner case member and an outer case member," must be secured to the core member and must have at least two portions movable relative to one another." Paper No. 46, D1, Col. 7-8, line 1-10. Moreover, the '720 Patent specification states that the "outer housing" is comprised of "an external cover, an internal tubular member, and rotatable base." Id., Col. 1 lines 19-22. During the prosecution process. Plaintiff, further clarified the housing structure in order to distinguish her invention from Gelardin's patent. She explained:

> [t]he Hemphill device, after removing the outer housing serves as handle structure, and still serves as a function for the device, unlike Gelardin...that states that the cover is completely removed.

Thus, the outer housing is not designed to be removed and thrown away but actually functions as a handle for the use of the swab. Plaintiff's suggestion that the outer housing

is only equivalent to protective packaging is clearly at odds with both the terms of the patent as well as the Plaintiff's own assertions during the prosecution phase.

C. Core Member

Plaintiff claims that having an accused device with a core member, whether flexible or rigid, is enough to infringe upon her patent. However, according to the'720 patent specifications, the core member should be fairly rigid, Id. , Col. 7, lines 10, and have an "annular band or ring" at the base, Id., Col. 5, lines, 31 - 33. Furthermore, the core member is secured to the outer housing "can be formed either as a solid structure preferably with a hollow interior." Id., Col. 5, lines 33-35. The purpose of the "annular band" is two-fold: 1) "to keep sticky fingers off the fiber," Id., Ex. F2. PTO 00447, and 2) to possess "an outer diameter which is at least equal to the inner diameter of the band attached to the outer housing, "so that the two can fit thereby allowing the core to be secured within the band by a suitable adhesive." Id., Ex. D1, Col. 5, line 45-48. Thus, consistent with the patent specifications, claim 2 require a fairly rigid core member with an annular band or ring at its base that can fit into the band or ring of the outer housing.

D. Layer of porous material

Plaintiff identified the layer of porous material as a critical element of her invention. Paper No. 46, Ex. G. In prior documentation, including the patent itself, Plaintiff provided a much more specific definition for the

layer of porous material. In fact, the '720 patent specification dictates that the porous material should be "secured about the exterior surface [the] core." Id., Ex. D1, Col. 5, line 35-37. Moreover, the porous material should be a "thick gauze type adsorbent pad or layer." Id., Col. 2, lines 7-8. During the reexamination proceedings, Plaintiff emphasized that the absorbency of her invention distinguished it from McNair's absorbent invention. Id., Ex. E1, AH 0229 ("Hemphill improves absorbing on the McNair cover sheet because of an absorbency characteristic"). According to the patent specification and Plaintiff's previous assertions, the porous material should be secured to the exterior surface of the core member and be composed of adsorbent material.

2. Comparison to Accused Device

After the claims are properly construed, then the terms "must be compared to the accused device or process." *Carroll Touch Inc., v. Electro Mechanical Systems, Inc* 15 F. 3d, 1573, 1576 (Fed. Cir. 1993). "In order for there to be infringement, each and every limitation set forth in a patent claim must be found in the accused device, either literally or doctrine of equivalents." *Bell Atlantic Network Services v. Covad Comm. Group, Inc.* 92 F.Supp. 2d. 483, 498 (E.D. Va. 2000) (citing *Lemelson v. United States*, 752 F2d. 1538,1551 (Fed. Cir. 19985)).

a. Literal Infringement

Plaintiff offers an advertisement for the accused

devices as evidence the Defendant has literally infringed her patent. The advertisement contains these assertions : 1) "an absorbent core pulls fluid-in and locks it away", and 2) "the silky clean cover draws fluid away and helps keep it below the surface to help you feel clean and dry." Paper No. 52, Ex.2. Despite Plaintiff's attempts to portray the elements of her invention in a manner to the quoted advertisement she is unable to prove that each element of her patented invention can be found in the accused devices. A claim of literal infringement requires proof that the accused devices meet every limitation of the properly construed claims, *Gentry Gallery, Inc. v. Berkline Corp.*, 134 F. 3d. 1473, 1476 (Fed. Cir. 1998). "If even one limitation is missing and not met as claimed, there is no literal infringement. *Mas-Hamilton Group v. LaGard, Inc.*, 156 F3d. 1206 , 1211 (Fed. Cir. 1998).

First, and foremost, Plaintiff has stated that her vaginal swab does not resemble, behave or function like a sanitary napkin. Each of the accused products is a type of sanitary napkin which lacks the rigid core required in a swab and is not designed for use within the vaginal canal. The accused products are designed "to cover a substantial portion of an undergarment in order to passively collect fluid that flows onto them." Paper No. 46 Ex. B, ¶ 12.

Second, the structure of Plaintiff's invention differs vastly from the accused devices on each element. Plaintiff's vaginal swab is comprised of an outer housing

structure that encloses a core member in first position and exposes the core member and forms a handle for the swab in the second position. The accused devices has an outer wrapping that is discarded once the sanitary napkin is utilized. At most, the discarded wrapper covers the used and soon- to- be discarded napkin. The protective packaging of the accused devices is in no way equivalent to the handle function of the "outer housing" in Plaintiff's invention.

Moreover, Plaintiff asserts that because the accused products have a core pad, they infringe upon her invention. However, the '720 patent clearly specifies that the core member be "fairly rigid" and have an annular band at its base that can fit into the band of the outer housing. The accused products do not have such a structure.

Finally, Plaintiff went to great lengths during the reexamination phase to distinguish the absorbency characteristics of the porous material used in her invention versus the absorbency characteristic of the McNair patent. Plaintiff, herself asserts that McNeil's products have an absorbent core yet, offers absolutely no explanation as to how the porous material can possibly be the same between Plaintiff's invention and the accused devices. Accordingly, Plaintiff has failed to establish that the accused products literally infringe upon her '720 patent.

B. Doctrine of Equivalents

Under this doctrine, a product which does not literally infringe upon the express terms of a patent may nonetheless infringe if there is "equivalence" between the elements of the accused products and the claimed elements of the patent. *Zelinski v. Brunswick Corp.*, 185 F3d. 1311, 1316 (Fed. Cir. 1999) (citing *Warner-Jenkinson, Inc. v, Hilton Davis Chem Co.* 520 U.S. 17, 21, (1997)). Infringement occurs under this doctrine or equivalents if the difference between the particular element and the claim limitation are "insubstantial". Id. A test to determine "insubstantially" is whether "the element performs substantially the same function in substantially the same way to obtain substantially the same result as the claim limitation." Id. At 1316-1317 (citing *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950).

Once again, Plaintiff has admitted that her invention, a vaginal swab, "does not look or behave like a sanitary napkin" or even "function like a sanitary napkin" Paper No. 46, Ex. E3, AH 0245. Moreover, Plaintiff has failed to offer a single assertion illustrating that the difference between the elements of her invention and the accused devices is only insubstantial. Rather, the evidence establishes the difference is vast. Accordingly, the court shall find that no reasonable jury could find there to be equivalence between the elements of Plaintiff's invention and the accused devices.

IV. Conclusion

For the foregoing reasons, this court shall GRANT McNeil's Motion for Summary Judgement for noninfrignement.

A separate Order will be entered .

/s/DEBORAH K. CHASANOW
United States District Judge
March 12, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEGRA D. HEMPHILL v. JOHNSON & JOHNSON

Civil Action No. DKC 99-654

Date of Entry February 11, 2000

Filed: February 14, 2000

MEMORANDUM OPINION AND ORDER

Plaintiff, proceeding pro se, brought suit against Johnson & Johnson, Inc., for patent infringement. Johnson & Johnson seeks to have the appropriate wholly owned subsidiary, McNeil-PPC, Inc., substituted as the correct defendant. Plaintiff's opposition does not suggest any proper reason to refuse this request. McNeil-PPC, Inc. will be represented by the same counsel, and the case will remain in the same posture it is in now, with the only change being that the correct corporate entity will be the official defendant. Accordingly, it is this 11th day of February, 2000, by the United States District Court for the District of Maryland, ORDERED that;

1. Defendant's motion to substitute BE, and the same hereby IS, GRANTED;

2. Johnson & Johnson, Inc. is replaced by McNeil-PPC, Inc. as the party defendant; and

3. The Clerk will transmit a copy of this order to Plaintiff and to counsel for the Defendant.

/S/DEBORAH K.. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEGRA D. HEMPHILL v. THE PROCTER & GAMBLE COMPANY, et al.

Civil Action No. DKC 2002-3736

Date of Entry February 12, 2003

ORDER TO SHOW CAUSE

Defendants have filed a Motion to Stay Discovery Pending Resolution of the Summary Judgement motion. Accordingly, IT IS this 12th day of February, 2003, by the United States District Court for the District of Maryland, ORDERED that:

1. Plaintiff Show Cause by no later that February 19, 2003, why the Motion to Stay should not be granted; and

2. The Clerk will transmit a copy of this Order to plaintiff and counsel for Defendants.

/s/DEBORAH K. CHASANOW

United States District Judge.

C/M

2/12/03mlm

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

ALLEGRA D. HEMPHILL v. PROCTER & GAMBLE COMPANY and KIMBERLY-CLARK CORPORATION

Civil Action No. DKC 2002-3736

Date of Entry February 21, 2003

ORDER

The Court, having reviewed Defendants' Joint Motion to Stay Discovery Pending Resolution of Summary Judgement Motions, ~~and any~~ there being no Opposition thereto, it is this 21st day of February, 2003, ORDERED AND ADJUDGED:

1. Defendants' ~~Joint~~ Motion to Stay Discovery Pending Resolution of Summary Judgement Motions is hereby GRANTED; and

2. The Clerk shall mail copies of the Order to all counsel of record and to the Pro Se Plaintiff.

/s/Ho.n Deborah K. Chasanow
United States District Judge
District of Maryland, Southern Division

c/m

2/21/03

30cl

United States Court of Appeals for the Federal Circuit

03-1463

ALLEGRA D. HEMPHILL, Plaintiff-Appellant,

v.

PROCTER & GAMBLE CO., Defendant-Appellee,

v.

KIMBERLY-CLARK CORPORATION

Defendant-Appellee.

COMBINED PANEL REHEARING AND REHEARING EN BANC DENIED

Dated: February 23, 2004

Before RADER, BRYSON, and GAJARSA, Circuit Judges. RADER, Circuit Judge.

United States Court of Appeals for the Federal Circuit

03 -1463

ALLEGRA D. HEMPHILL, Plaintiff-Appellant,

v.

PROCTER & GAMBLE CO., Defendant-Appellee,

v.

KIMBERLY-CLARK CORPORATION

Defendant-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the

panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED, that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 1, 2004.

Circuit Judge Schall did not participate in the vote.

FOR THE COURT,

/s/_____

Jan Horbaly, Clerk

Dated: February 23, 2004

cc. Allegra D. Hemphill

Kenneth R. Adamo, V. Bryan Medlock Jr.

Filed U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT FEB. 23, 2004

HEMPHILL V. PROCTER & Gamble, 03-1463 (DCT -02-CV-3736)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

STATUTES: TITLE 35 UNITED STATES CODE

35 U.S.C. §102
35 U.S.C. §103
35 U.S.C. §112
35 U.S.C. §131
35 U.S.C. §132
35 U.S.C.§ 307

35 U.S.C. §102 . Conditions for patent ability; novelty and loss of right to patent

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

(c) he [or she] has abandoned the invention, or

(d) the invention was first patented or caused to be patented by the applicant or his [or her] legal representatives or assigns in a foreign country prior to the date of application for patent in this country on a application filed more that twelve months before the filing of the application in the United States, or

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or

(f) he [or she] did not himself [or herself] invent the subject matter sought to be patented, or

(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other. (R.S. 4886, 4887, 4923: 35 U.S.C., 1946 ed., 31 32, 72).

Notes- Section 4(b) of the Act of July 19, 1952 provides:

"Section 102(d) of title 35, as enacted by section 1 hereof, shall not apply to existing patents and pending applications, but the law previously in effect, namely the first paragraph of R.S. 4887 (U.S. Code, title 35, sec. 32, first paragraph, 1946 ed.), shall apply to such patents and applications."

Section 4(d) of the Act of July 19, 1952 provides:

"The period of one year specified in section 102(b) of Title 35 as enacted by section 1 hereof shall not apply in the case of applications filed before August 1940, and patents granted on such applications, and with respect to such applications and patents, said period is two years instead of one year."

35 U.S.C.§ 103 . Conditions for patent ability' non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sough to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patent ability shall not be negatived by the manner in which the invention was made.

35 U.S.C. §112 Specification:

The specification shall contain a written description

of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his [or her] invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his [or her] invention.

An element in a claim for combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts

in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof. (R.S. 4888; 35 U.S.C., 1946 ed., 33.).

35 U.S.C.§§131 . Examination of application.

The Commissioner shall cause an examination to be made of the application and the alleged new invention; and if on such examination it appears that the applicant is entitled to a patent under the law, the Commissioner shall issue a patent therefore.

35 U.S.C.§132. Notice of rejection; reexamination

Whenever, on examination, any claim for a patent is rejected, or any objection or requirement made, the Commissioner shall notify the applicant thereof, stating the reasons for such rejection, or objection or requirement, together with such information of the propriety of continuing the prosecution of his [or her] application; and if after receiving such notice, the applicant persists in his [or her] claim for a patent, with or without amendment, the application shall be reexamined. No amendment shall introduce new matter into the disclosure of the invention. (R.S. 4903; 35 U.S.C., 1946 ed., 51).

CODE OF FEDERAL REGULATIONS

Under 37 C.F.R. 1.121, an amendment made in the United States Patent and Trademarks Office is a formal process. The [p]roper claim amendment format is shown in the Manual of Patent Examining Procedure 2250: "Manner of making amendments." See MPEP 1.530

Statement and amendment by patent owner:

(A) Except as otherwise provided in § 1.501(e), no statement or other response by the patent owner shall be filed prior to the determinations made in accordance with §§ 1.515 or 1.520. If a premature statement or other response is filed by the patent owner it will not be acknowledged or considered in making the determination.

See MPEP § 1.150(e). A request filed by the patent owner, may include a proposed amendment in accordance with § 1.121(f) .

See MPEP § 1.121(f) . Proposed amendments in patents involved in reexamination proceedings must be presented in the form of a full copy of the text of: (1) Each claim which is amended and (2) each paragraph of the description which is amended. Matter deleted from the patent shall be placed between brackets and matter added shall be underlined. Copies of the printed claims from the patent may be used with any additions being indicated by carets and deleted materials being placed between brackets. Claims must not be renumbered and the numbering of the claims added for reexaminations must follow the number of the highest numbered patent claims. No amendments may enlarge the scope of the claims of the patent . No new matter may be introduced into the patent.

1. A disposable vaginal swab comprised of a housing surrounding a swab member comprised of a stiff core member and an absorbent outer covering secured thereto, at least a portion of s aid housing comprising a removable cover to close said housing and protect said swab member within said housing, said core member being movably retained within said housing so as to be moveable between a first retracted position and a second extended position relative to said housing when said cover has been removed and means for moving said core member between said first retracted and said second extended positions.

2. A swab as in claim 1, wherein said adsorbent cover is comprised of a textile gauze-like fabric.

3. A swab as in claim 1, where said moving means includes a rotatable member rotatably secured to said housing and cam means operatively connecting at least a portion of said core member and the interior of said housing together so that said core member will move vertically within said housing as said rotatable member is rotated.

4. A swab as in claim 3, wherein said core means comprises a cam member fixed to the core member and a tube rotatably retained within said housing and about said core member, said tube member including means defining at least one helical slot extending along length thereof with said core member being operatively associated with said helical slot.

5. 1. A vaginal swab comprised of an outer housing having a closed and open end on opposing ends thereof, said housing including an annular band defining said open end and a plurality of frangible seams that together define a pair of removable members and a pair of housing segments hingably secured to said annular band following removal of said removable members, a swab core member having a predetermined exterior shape, said core member having an annular base with an outer diameter equal to the inner diameter of said annular band and an adsorbent member secured to said core member, said core member being secured within said housing so that said adsorbent member is enclosed therein.

6. 2. A vaginal swab comprising and outer housing including an inner case member and an outer case member at least part of which is connected to and overlies said inner case member;

a core member, at least one layer of a porous material secured to said core member, and housing means for supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions movable relative to one another between first and second positions for enclosing said core member when in said first position and for both exposing said core member and the said porous padding secured thereto and for forming a handle for said swab when in said second position.

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS , WASHINGTON DC 20231
Serial Number 06/434,828
Filing Date 10/18/82
First Named Applicant HEMPHILL A.
Attorney Docket Number
Cushman, Darby & Cushman
1801 K. St., N.W. 8th FLR.
Washington, DC 20006
Examiner Yasko, J.
Art Unit 336
Paper Number 4
Date Mailed 02/28/84

This is a communication from the examiner in charge of your application.

A shortened statutory period for response to this action is set to expire 30 days from the date of this letter.

SUMMARY OF ACTION

1. Claims 1-6 are pending in the application.

6. Claims 1-6 are subject to restriction or election requirement.

(1) This application contains claims directed to the following patentably distinct species of the claimed invention: Figs. 1-2a: Figs. 3-4a" Fig. 6: Figs. 8,9 respectively.

Applicant is required under 35 U.S.C. 121 to elect a single species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claim 1 is generic.

Applicant is advised that a response to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a generic claim is allowable or that all claims are generic is considered non-responsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to not more that a reasonable number of species in addition to the elected species, provided that all claims to each additional species are written in dependent form or otherwise all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP 809.02(a).

J. Yasko :rk /s/ John D. Yasko
703-557-3501 Examiner Art Unit
336 2/23/84

PTOL Form 1449
US DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

INFORMATION CITED BY APPLICANT

Atty Docket No. 3801/22914 Serial No. ~~434,828~~ 619,684
Applicant Allegra Hemphill
Filing Date October 18, 1982 Group 335

Document Number	Date	Name	Class	Subclass
2344060	3/14/44	RAY		
3586452	6/22/71	MASON		
3731682	5/8/73	FIELDING		
251502	4/3/79	BRIDLE		
4155991	5/22/79	SCHOPFLIN		
4157709	6/12/79	SCHUSTER		
4159718	7/3/79	BOWER		
4165942	8/28/79	JOHANSSON		
4175439	11/27/79	LAKER		

DATE CONSIDERED

~~J. YASKO~~ ~~4-3-84~~
CHRISTA SCOTT 12-13-84

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of
Allegra HEMPHILL
Serial No. 434,828 Group:336
Filed: October 18, 1982 Examiner: Yasko
For: VAGINAL APPLICATOR Paper No. 6.

********** ********** **********

March 26, 1984

Honorable Commissioner of
Patents and Trademarks
Washington, DC 20231

LETTER

Sir:

In response to the Official Action dated February 28, 1984, please consider the following remarks.

REMARKS

In response to the above identified action, the applicant hereby elects the species of Group I, comprised of Figures 1,2 and 2a for purposes of further prosecution and subject to the allowability of one or more generic claims. A review of the claims has been made and the claims 1,2 and 3 read on the elected species.

An early and favorable action is respectfully requested.

Respectfully submitted,
CUSHMAN, DARBY & CUSHMAN

PWG:lsp By:/s/_____

1801 K. Street, N.W.

Washington, DC 20231
Tel. 861-3078

Peter W. Gowdey
Reg. No. 25,872

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS , WASHINGTON DC 20231
Serial Number 06/434,828
Filing Date 10/18/82
First Named Applicant HEMPHILL A.
Attorney Docket Number
Cushman, Darby & Cushman
1801 K. St., N.W. 8th FLR.
Washington, DC 20006
Examiner Yasko, J.
Art Unit 336
Paper Number 7
Date Mailed 04/12/84

This application has been examined.
Responsive communication filed on 3-28-84.
A shortened statutory period for response to this action is set to expire 3 months from the date of this letter.
THE FOLLOWING ATTACHMENTS ARE PART OF THIS ACTION
1. Notice of References Cited by Examiner, PTO-892.

3. Notice of Art Cited by Applicant, PTO-1449.

SUMMARY OF ACTION

1. Claims 1-6 are pending in this application.

Of the above, **claims 4-6 are withdrawn from consideration.**

4. Claims 1-3 are rejected.

7. This application has been filed with informal drawings which are acceptable for examination purposes until such time as allowable subject matter is indicated.

Serial Number 434.828

Art Unit 336

1. The following is a quotation of 35 U.S.C. 103 which forms the basis for all obviousness rejections set forth in this Office action:

> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patent ability shall not be negatived by the manner in which the invention was made.

2. Claims 1 and 3 are rejected under 35 U.S.C. 103 as being unpatentable over Kenner in view of Gelardin.

It is considered obvious and well within the skill of the art to provide the device of Kenner, with a removable cover and rotatable moving means as taught by Gelardin if so needed or desired.

3. Claim 2 is rejected under 35 U.S.C. 103 as being unpatentable over Kenner in view of Gelardin as applied to claim 1 above, and further in view of Alvarez.

Obvious selection of one well known absorbent means for another to select fabric as taught by Alvarez, column 4, lines 17-19 producing no new r unobvious results.

Art of interest:

Barlow, Jeffreys, Gashkell, Austrian patent cited to show swabs.

J.D. Yasko /mb
703-557-3501
4/5/84

/s/_____
John D. Yasko, Examiner
Art Unit 336

Allegra D. Hemphill
1507 Linden Street, Apt. #13
Johnson City, Tn. 37601

May 10, 1984

Commissioner of Patent and Trademarks
Washington, DC 20231

Commissioner of Patent and Trademarks:

I would like to amend the patent specification for the applicant, Allegra D. Hemphill of Johnson City, Tennessee.

The specification covers a small entity, Vaginal Applicator, Serial Number 06/434,828, with the filing date of 10/18/82.

An alternative drawing has been provided herewith, and is considered to be covered by the generic claim(s) to the original application.

A Revocation of Power of Attorney is also enclosed herewith.

Please submit the contents enclosed herewith, to the attention to the United States Patent and Trademark Office Examiner J. Yasko, Art Unit 336.

Sincerely,
Allegra D. Hemphill

RECEIVED
May17, 1984
Group 350

PATENT AND TRADEMARK OFFICE

MAILROOM S. Little

May 14, 1984 5-21-84

Paper No. 8

REVOCATION OF POWER OF ATTORNEY

I, ALLEGRA D. HEMPHILL, formerly of 6217 Charnwood Drive Rockville, Maryland, presently residing at 1507 Linden Street, #13 Johnson City, Tennessee, 37601, having by instrument dated October 15, 1982, appointed Cushman, Darby & Cushman power of attorney for original U.S. Patent applications in the United States Patent & Trademark Office, do hereby and the same is hereby revoked.

It is my intention that any and all correspondence with the U.S. Patent & Trademark Office directly to my Johnson City, Tennessee address.

ALLEGRA D. HEMPHILL

Sworn to and subscribed before me this 9th day of May, 1984.

/S/ NOTARY PUBLIC

My commission expires:
Jan. 27, 1988

PREPARED BY
GUY S. WEEMS, JR.
ATTORNEY AT LAW
P.O. BOX 313
120 S. CHEORKEE
JONESBOROUGH, TN.37659

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS , WASHINGTON DC 20231
Serial Number 06/434,828
Filing Date 10/18/82
First Named Applicant HEMPHILL A.
Attorney Docket Number
Allegra D. Hemphill
1507 Linden Street, #13
Johnson City, Tennessee, 37601
Examiner Yasko, J.
Art Unit 336
Paper Number 10
Date Mailed 05/25/84
This is a communication from the examiner in charge of your application.
COMMISSIONER OF PATENTS AND TRADEMARKS
Responsive to communication filed on This action is made final.
A shortened statutory period for response to this action is set to expire 3 months from the date of this letter.
SUMMARY OF ACTION
1. Claims 1-6 are pending in the application.
Of the above, **claims 4-6 are withdrawn from consideration.**
4. Claims 1-3 are rejected

Serial Number 434,828
Art Unit 336

1. The amendment filed May 14, 1984 is objected to under 35 U.S.C. 132 because it introduces new matter into the specification. 35 U.S.C. 132 states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows:

additions to specification and proposed new drawing figures.

Applicant is required to cancel the new matter the response to this Office action.

The amendment to claim 2, is not entered since it is directed to a non-elected species. The species of Figures 1,2,3a was elected paper #6.

2. The following is a quotation of 35 U.S.C. 103 which forms the basis for all obviousness rejections set forth in this Office action:

> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the rt to which said subject matter pertains. Patent ability shall not be negatived by the manner in which the invention was made.

2. Claims 1 and 3 stand rejected under 35 U.S.C. 103 as being unpatentable over Kenner in view of Gelardin. It is considered obvious and will within the skill of the art to provide the device of Kenner with a removable cover and rotatable moving means as taught by Gelardin if so needed or desired.

4. Claim 2 is rejected under 35 U.S.C. 103 as being unpatentable over Kenner in view of Gelardin as applied to claim 1 above, and further in view of Alvarez. Obvious selection of one well known absorbent means for another to select fabric as taught by Alvarez column 4, lines 17-19, producing no new or unobvious results. It is noted that in any future response to the Office action applicant must submit an argument under the heading "Remarks" pointing out disagreement with the Examiner's contentious. Applicant must also discuss the references applied against the claims, explaining how the claims avoid the references or distinguish from them.

5. This action is a final rejection and is intended to close the prosecution of this application. Applicant's response to this action is limited either to an appeal to the Board of Appeals or to an amendment complying with the requirements set forth below.

If applicant should desire to appeal any rejection made by examiner, a Notice of Appeal must be filed within the period for response identifying the rejected claim or claims appealed. The Notice of Appeal must be accompanies by the required appeal fee of $57.50.

If applicant should desire to file an amendment, entry of a proposed amendment after final rejection cannot be made as a matter of right unless it merely cancels claims or complies with a formal requirement made earlier. Amendments touching the merits of the application which otherwise might not be proper may be admitted upon a showing of good and sufficient reasons why they are necessary and why they were not presented earlier.

The filing of an amendment after final rejection, whether or not it is entered, does not stop the running of the statutory period for response to the final rejection unless the examiner holds the claims to be in condition for allowance. Accordingly, if a Notice of Appeal has not been filed properly within the period for response or any extension of the period obtained under either 37 CFR 1.136(a) or (b), the application will become abandoned.

/s/ Johnson D. Yasko
Examiner
Art Unit 336

J. Yasko:dg
703-557-3144
05-24-84

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of
Allegra Hemphill
Serial No. 434,828 Group 336
Filed: October 18, 1982
For: Vaginal Applicator

********** ********* *******

****

Honorable Commissioner of June 6, 1984
Patents and Trademarks
Washington, D. C. 20231

Sir:

Attached is an application for a File Wrapper PTO-37CFR 1.62, in response to the Examiner's Office Action on 5/25/84.

This submission is to transfer the aforementioned Serial No. 434.828, abandoned of Species #1, Figures 1,2,2a to elect species #4, Figures 8 an 9.

I have included REMARKS, as suggested by the Office Action, to discuss the references cited, applied against the claims; Alvarez, Kenner and Gelardin distinguishing the differences for all obviousness, as well as supplying reasons for the claims that have been modified.

This material concerns the Vaginal Applicator Device

Allegra Hemphill, Inventor

Serial No. 434,828

Filed October 18, 1982

I wish to elect species #4, Figures 8 and 9, as the embodiment to be brought to the Examiner's attention; Examiner Johnson Yasko, Group 336 for his review and consideration.

Enclosed is the $150.00 fee for the File Wrapper process.

Respectively submitted :

By: /s/_____

Allegra Hemphill

ADH:tr

157 Linden Street #13

Johnson City, Tennessee 37601

Rel. (615) 926-7568

PTOL -37 (Rev.8-82) NOTICE OF ALLOWABILITY

Serial Number 619, 684 -2-
Art Unit 336

1. Claims 1-4 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b) as being drawn to a non-elected species. Election was made without traverse in Paper No. 1 as filed with continuation application papers.

The papers filed with request for File Wrapper Continuation received June 11, 1984 and the election of species #4, Figures 8 and 9 is noted. The claims readable on the elected species are 5 and 6.

2. Accordingly, claims 1-4 have been canceled.

3. At page 1 of the specification, the following has been inserted, –This Application is a continuation of Serial #434,828 filed October 18, 1982 now abandoned–.

/s/_____

/s/_____

C. Scott/mb John D. Yasko

703-557-3125 Examiner
12/18/84 Art Unit 336

UNITED STATES DEPARTMENT OF COMMERCE
Patents and Trademark Office
619, 684
UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS
WASHINGTON, DC 20231
A. Gomillion
12-19-84
EXAMINER ART UNIT PAPER NUMBER
Paper Number 3/.A
DATE MAILED: JAN 7-1985

This is a communication from the examiner in charge of your application
COMMISSIONER OF PATENTS AND TRADEMARKS
1. THIS IS AN ATTACHMENT TO THE NOTICE OF ALLOWANCE AND BASIC ISSUE FEE DUE, PTOL 85.
2. All the claims being allowable, PROSECUTION ON THE MERITS CLOSED in this application. If not attached hereto, a Notice of Allowance or other appropriate communication will be sent in due course.

B. Formal drawings are now required and MUST BE SUBMITTED WITHIN THE THREE MONTH STATUTORY PERIOD SET FOR PAYMENT OF THE BASE ISSUE FEE IN THE "NOTICE OF ALLOWANCE

AND BASE ISSUE FEE DUE" (PTOL-85). Note that the statute does not permit extension of the three months

a). The claims are allowed in view of:

b) Applicant's communication filed June 11, 1984.

c) The attached Examiner's Amendment.

d) **The allowed claims are 5 and 6.**

4. Note attached NOTICE OF REFERENCES CITED, PTO -892 which is part of this communication. The listed references are considered to be permitted to the claimed invention, but the claims are deemed to be patentable thereover.

5. Note attached LIST OF ART CITED BY APPLICANT, PTO -1449.

/s/_____

John D. Yasko

Examiner

Art Unit 336

UNITED STATES DEPARTMENT OF COMMERCE

Patents and Trademark Office

ORDER GRANTING/DENYING REQUEST
FOR REEXAMINATION
McNair U.S.Patent 4,285,343

ReExamination No. 90/004,908

Date mailed 04/15/98

The request for reexamination is DENIED.

In due course, a refund under CFR 1.26(c) will be made to requester (listed below if not patent owner) by Treasury check.

ReExamination No. 90/004,908

Art Unit 3734

Decision

No substantial new question of patent ability is raised by the request for reexamination and prior art cited therein for the reasons set forth below.

The newly cited U.S. patent 4,285,343 issued to McNair does not raise a substantial new question of patent ability as to claims 1 and 2 of the requesters U.S. Patent 4,557,720 issued to Hemphill.

The claims of the Hemphill patent for which reexamination is requested , require "A vaginal swab comprised of...a pair of hinged housing segments defined by a plurality of frangible seams...in which an absorbent member is enclosed therein." And in claim 2, "a vaginal swab...including a moveable inner and outer case

member;" a core member...including at least one layer of porous material secured to a core member, and housing means for supporting and enclosing said core member, said core member being secured to said housing means, having at least two portions moveable relative to one another between first and second positions for enclosing said core member when is said first position and for both exposing said core member and the said porous material secured thereto and for forming a handle for said swab when in said second position."

The U.S. patent to McNair discloses none of the structural features recited, supra. Further, the McNair patent is neither relevant under 35 U.S.C. 102 nor U.S.C. 103. Accordingly, since the newly submitted prior art McNair presents no substantial new question of patent ability, the request for reexamination is DENIED.

J. Yasko:lf /s/_____)
703 308-2986
April 3, 1998

UNITED STATES DEPARTMENT OF COMMERCE

Patents and Trademark Office

ORDER GRANTING/DENYING REQUEST FOR REEXAMINATION

Serial Number 90/004987

Patent under reexamination : 4,557,720

Date mailed 07/06/98

Art Unit 3735

The request for reexamination has been considered. Identification of the claims, the references relied on, and the rationale supporting the determination are attached.

Attachment(s); PTO-892.

The request for reexamination is GRANTED.

Serial Number 90/004987

Art Unit 3735

A substantial new question of patent ability affecting claim 2 of United States Patent Number 4,557,720 is raised by the request for reexamination.

Extensions of time under 37 CFR 1.136(a) will not be permitted in these proceedings because the provisions of 37 CFR 1.136 apply only to "an applicant" and not to parties in a reexamination proceeding. Additionally, 35 U.S.C. 305 requires that reexamination proceedings "will be conducted with special dispatch" (37 CFR 1.550 (a)). Extensions of time in reexamination proceedings are provided for in

37 CFR 1.550(c).

The request for re-examination indicates that the

patent to Srininvasan et al. . (39735567) may be relevant to claim 2 and the examiner feels that further consideration of this reference is warranted as it was not considered during prosecution of patent #4,557,720. The request also presents arguments as to why claim 2 is patent able over the patent to Srininvasan et al. . (3973567).

It is agreed that the reference to Srininvasan et. al. raises a substantial new question of patent ability with respect to claim 2. Srininvasan et al.., has structure that may read on claim 2 such as a core member surrounded by a layer of porous material, an outer housing, and housing means with 2 positions (one position that protects the core member and another position that exposes the core member for use). For these reasons the examiner considers that there is a substantial new question of patent ability with respect to claim 2 versus the patent to Srininvasan et. al.

("s/_____)
John G. Weiss
Supervisory Patent Examiner

D.R. (Initials)

Assistant Examiner, Sector 3700 Group 3700

UNITED STATES DEPARTMENT OF COMMERCE

Patents and Trademark Office

NOTICE OF INTENT TO ISSUE

REEXAMINATION CERTIFICATE

Examination has been terminated in this re-exam proceeding and a certificate will be issued in due course in view of patent owner's communication filed on 7/14/98; 7/11/98 and 7/24/98.

The Reexamination Certificate will indicate the following::

Change in the Specification : No

Change in the Drawings: No

Status of the Claims : Patent claims confirmed 1,2.

Note attached statements of reasons for patent ability and/or confirmation. Any comments considered necessary by patent owner regarding reasons for patent ability and/or confirmation must be submitted promptly to avoid processing delays. Such submissions should be labeled: "Comments on Statement of Reasons for Patent ability and/or Confirmation".

("s/_____)

John G. Weiss

Supervisory Patent Examiner

Group 3700

cc. Requestor

Re-exam no. 90/004987 Date mailed 10/07/98
Art Unit 3735

STATEMENT OF REASONS FOR PATENT ABILITY AND/OR CONFIRMATION

The following is an examiner's statement of reasons for patent ability and/or confirmation of the claims found patent able in this reexamination proceeding:

Claim 1 of the patent to Hemphill (4557720) is considered patent able over the patent to Srininvasan et al. (3973567) because Srininvasan simply does not disclose the claimed structure, such as an open end opposite a closed end, an annular band, and frangible seams.

Claim 2 of the patent to Hemphill (4557720) is considered patent able over the patent to Srininvasan et al. (3973567) because Srininvasan does not disclose the housing means of Hemphill and does not disclose structure that could be considered equivalent to the housing means of Hemphill. In re Donaldson Co., 16 F.3d. 1189, 29 USPQ2d 1845 (Fed. Cir. 1994).

Any comments considered necessary by PATENT OWNER regarding the above statement must be submitted promptly to avoid processing delays. Such submission by the patent owner should be labeled: "Comments on Statement of reasons for Patent ability and/or Confirmation " and will be placed in the reexamination file.

2. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Dennis Ruhl whose telephone number is (703) 308-22-62.

("s/_____)

Johnson G. Weiss

Supervisory Patent Examiner

D.R. (Initials)September 1, 1998 Group 3700

REEXAMINATION CERTIFICATE (3712th)

United States Patent [19]

Hemphill

[54] **VAGINAL APPLICATOR**

[76]Inventor Allegra D. Hemphill, 6217 Charnwood Dr., Rockville, Md. 20852

Reexamination Request: No. 90/004.987. May 22, 1998

Reexamination Certificate for:

Patent No. **4,557,720**

Issued: **Dec. 10. 1985**

Appl. No. **619,684**

Filed: **Jun. 11, 1984**

Related U.S. Application Data

[62] Division of Ser. Bo. 434,828 Oct. 18, 1982, abandoned.

051] Int. Cl. A61B 10/00

[11] **B1 4,557,720**
[45] Certificate Issued **Jan. 26,1999**
[52] U.S. Cl. 604/1; 401/77; 401/78
[56] **References Cited**
U.S. PATENT DOCUMENTS
3,973,567 8/1976 Srininvasan et al. 604/386
Primary Examiner -John Weiss
[57] **ABSTRACT**
A disposable vaginal refresher or swab comprised of an outer container for enclosing an inner, fairly rigid core member about which an adsorbent layer is secured. The outer container when removed exposes the adsorbent covered member or allows that member to be moved out of the container into an operable position. The outer container also forms the handle of the disposable swab element.

B1 4,557,720
REEXAMINATION CERTIFICATE ISSUED UNDER 35 U.S.C. 307

NO AMENDMENTS HAVE BEEN MADE TO THE PATENT.

AS A RESULT OF REEXAMINATION IT HAS BEEN DETERMINED THAT:
The patentability of claims **1** and **2** is confirmed.